Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MICHAEL O. LEAVITT, as Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State Utah,
Petitioners,

v.

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; et al., *Respondents.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 1997

75 pp

QUESTION PRESENTED

The State of Utah determined that, unless the health and safety of the woman require otherwise, elective abortions may not be performed when a woman is 21 or more weeks pregnant --a point at which viability is reasonably possible and after which an abortion is difficult for both the woman and the physician. The extensive factual record in this case shows that no Utah doctor would perform an abortion for reasons not permitted by Utah's statute once a woman is 21 or more weeks pregnant, and that no woman 21 or more weeks pregnant has sought an abortion for reasons not permitted by the Utah statute. Accordingly, the question presented is:

> Do regulations that limit post-20 week abortions to those abortions necessary to protect the life or health of the woman violate the constitutional limits established by *Planned Parenthood v. Casey*?

PARTIES TO THE PROCEEDING

This action was originally brought against Norman Bangerter, Governor of Utah, and Paul Van Dam, Attorney General of Utah, both of whom were in office in 1991. Their successors are Governor Michael O. Leavitt and Attorney General Jan Graham. Pursuant to Supreme Court Rule 35.3, the successors to the originally named public officers have been substituted as *Petitioners* here.

In addition to the parties listed as *Respondents* in the caption, additional respondents include: Utah Women's Clinic, P.C.; Planned Parenthood Association of Utah; Utah College of Obstetricians and Gynecologists; David Hansen, M.D.; Madhuri Shah, M.D.; John Carey, M.D.; Dan Chichester, M.D.; Kirtly Parker Jones, M.D.; Kathleen Kennedy, M.D.; Neil Kochenour, M.D.; Rhonda Lehr, M.D.; Claire Leonard, M.D.; and Kenneth Ward, M.D.; on behalf of themselves, and all others similarly situated; Wendy Edwards; Penny Thomas; Bonnie Jeanne Baty; Susan Elizabeth Lyons; Janet Lynn Wolf; Leslie McDonald-White; Reverend David Butler; Reverend Barbara Hamilton-Holway; Reverend George H. Lower; Reverend Lyle D. Sellards; Reverend Alan Condie Tull; Reverend Marie Soward Green; and Rabbi Frederick L. Wenger.

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October Term, 1996

MICHAEL O. LEAVITT, et al., *Petitioners,*

v.

JANE L., et al., *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Michael O. Leavitt, as Governor of the State of Utah, and Jan Graham, as Attorney General of the State of Utah, petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported as *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996). A copy is attached as Petitioners' Appendix, pp. A-1 to A-13. The memorandum decision and order of United States District Court Judge J. Thomas Greene is reported as *Jane L. v. Bangerter*, 809 F.

Supp. 865 (D. Utah 1992).[1] A copy is attached as Petitioners' Appendix, pp. B-1 to B-37.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit issued on December 23, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 76-7-302(3) states:

> (3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).

Subsections (2)(a), (d), and (e) provide:[2]

> (2) An abortion may be performed in this state only under the following circumstances:

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[1] The district court issued two earlier opinions in this case that are reported at 794 F. Supp. 1537 (D. Utah 1992), and 794 F. Supp. 1528 (D. Utah 1992). However, the questions addressed in them are not at issue here.

[2] Subsection 76-7-302(2), which applies to abortions performed before the 21st week, was held unconstitutional under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The portions of it incorporated into subsection 76-7-302(3) by reference are included here for the Court's convenience.

(a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;

* * *

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

STATEMENT OF THE CASE

In 1991, the Utah Legislature passed Senate Bill No. 23, which amended Utah's abortion law, Utah Code Ann. § 76-7-302 (1990). The amendments included two separate provisions restricting abortion. First, subsection 76-7-302(2), applicable to abortions during the first 20 weeks of pregnancy, provided that abortions can only be performed in five defined circumstances. It was acknowledged by the State that this subsection would be challenged and that its validity would probably hinge on whether this Court overruled *Roe v. Wade*, 410 U.S. 113 (1973). *See* Utah Code Ann. § 76-7-317.1 (establishing an Abortion Litigation Trust Account). After the decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), however, the State conceded that this subsection is unconstitutional and the district court so held. *Jane L. v. Bangerter*, 809 F. Supp. 865, 870 (D. Utah 1992), Pet.'s App. at B-12.

In the second provision, the Utah Legislature adopted "after 20 weeks gestational age"[3] as the point in time after which an abortion may only be performed when, in the professional judgment of the physician, it is necessary to save the mother's life, to prevent grave damage to maternal health, or to prevent the birth of a child with grave defects. Utah Code Ann. § 76-7-302(3).[4] Under the statute, the "maternal health" exception requires the physician to consider all factors relevant to the patient's well-being, including her physical, emotional and psychological health, as well as her age and familial situation. Utah Code Ann. § 76-7-304(1).[5] *See Doe v. Bolton,*

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[3] The medical community uses two methods for describing the elapsed length of a pregnancy: (1) menstrual age, measured from the first day of the last menstrual period (LMP); or (2) gestational age, measured from the date of conception. The Utah Legislature restricted abortions "**[a]fter** 20 weeks gestational age," measured from "the date of conception" and not from the point of last menstrual period, which is approximately two weeks earlier. The statute thus limits late "post-conception age" abortions. The statutory cutoff for most abortions, therefore, is 21 weeks from conception, i.e., starting in the 23rd week of pregnancy measured by LMP. *Jane L.*, 809 F. Supp at 869, Pet.'s App. at B-9 (emphasis added).

[4]The Tenth Circuit did not reach the question of whether the post-viability exceptions in subsection 76-7-302(3) are constitutional.

[5] Section 76-7-304(1) provides:

> To enable the physician to exercise his best medical judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be

(continued...)

410 U.S. 179, 192 (1973) (finding these factors critical to the exercise of the physician's "best clinical judgment"). "After 20 weeks gestational age," or 21 weeks from conception, was chosen as the point at which the State could impose restrictions on abortion based on available scientific evidence[6] and consistent with *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989) (upholding a statute that created a presumption of fetal viability at 20 weeks and required a physician to determine if the fetus was viable before performing an abortion on any woman more than 20 weeks pregnant).

In this litigation, plaintiffs challenged the constitutionality of section 76-7-302(3)'s prohibition of nontherapeutic abortion on demand once the woman is 21 weeks pregnant, measured from conception. The State defendants eventually moved for summary judgment and supported their motion with evidentiary materials. In response, plaintiffs opposed summary judgment and submitted their own evidentiary materials. After reviewing this extensive

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(...continued)

performed including, but not limited to,

(a) her physical, emotional and psychological health and safety,

(b) her age,

(c) her familial situation.

[6]Survival as early as 21 weeks gestational age (23 weeks LMP) is possible. *Jane L.*, 809 F. Supp. at 869, Pet.'s App. at B-9 (citing F. Gary Cunningham et al., *Williams Obstetrics* at 747-48 (18th ed. 1989)). Twenty-one weeks gestational age is the same as "**after** 20 weeks gestational age" as provided in section 76-7-302(3). *See* note 3, *supra*.

evidentiary record, District Judge J. Thomas Greene concluded that the facts material to resolution of the constitutional issue were not in dispute. *Jane L.*, 809 F. Supp. at 869, Pet.'s App. at B-8-10. He found that no woman in Utah had sought a nontherapeutic abortion when she was 21 or more weeks pregnant and that no medical provider in Utah would perform such late-term abortions. *Jane L.*, 809 F. Supp. at 873, Pet.'s App. at B-19. Based on these and other undisputed facts, Judge Greene upheld the constitutionality of the second statutory provision, i.e., the regulation in subsection 76-7-302(3) of abortions at and after the 21st week post-conception. He held that this regulation of post-viability abortions serves a legitimate legislative purpose and imposes no undue burden under the *Casey* standard. *Jane L.*, 809 F. Supp. at 871-74, Pet.'s App. at B-17-20. Judge Greene also concluded that the provision limiting post-viability abortions is severable from the previability ban in subsection 76-7-302(2) he had invalidated under *Casey*. *Jane L.*, 809 F. Supp. at 870, Pet.'s App. at B-13-14, 16.

On appeal, the Tenth Circuit Court of Appeals reversed the part of the district court judgment favoring the State defendants and held that the post-viability restriction on abortion in subsection 76-7-302(3) is not severable. The appellate court invalidated subsection 302(3) solely on this basis, without addressing its constitutionality standing alone. *Jane L. v. Bangerter*, 61 F.3d 1493, 1497 n.3, 1499 (10th Cir. 1995). This Court granted the State's ensuing petition for certiorari, summarily reversed the Tenth Circuit's judgment on the issue of severability, and remanded the case for further proceedings. *Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996).

On remand, the Tenth Circuit again reversed that part of the district court judgment upholding subsection 302(3) as constitutional. The appellate court held that the effect of this provision, which requires a woman who wants a nontherapeutic abortion to obtain one before she is 21 weeks pregnant, is to unduly burden her right to choose to abort a nonviable fetus. *Jane L.*, 102 F.3d at 1117, Pet.'s App. at A-12. The conclusion that subsection 302(3) is facially invalid was based on the appellate court's independent finding that women in Utah, who were 21 or more weeks pregnant, had sought nontherapeutic abortions of nonviable fetuses. *Id.* This material "fact," found for the first time on appeal, is both contrary to the unchallenged findings of the district court and unsupported by any record evidence.

REASONS TO GRANT THE PETITION

I. Subsection 302(3) of Utah's abortion law prohibits, with exceptions, abortions when a woman is 21 or more weeks pregnant (23 or more weeks LMP), the point in pregnancy when medical science considers fetal viability reasonably possible. This restriction is constitutional under *Planned Parenthood v. Casey*, for two primary reasons. First, District Judge Greene found, as undisputed facts from the extensive evidentiary record here, that no woman in Utah has sought, and no physician would perform, an abortion 21 or more weeks after conception, other than an abortion permitted by the exceptions included in the challenged statutory provision. *Jane L.*, 809 F. Supp. at 869-70, 873, Pet.'s App. at B-9-10, 19. Thus, the restriction in subsection 76-7-302(3) does not prevent any woman seeking a nontherapeutic abortion from terminating her pregnancy before viability and does not burden a woman's right to choose a previability abortion.

Second, the legislature may constitutionally fix a point after which women can no longer obtain abortions, with exceptions for pregnancies that endanger a woman's life or health. The Court of Appeals erroneously held viability must be determined by a physician on a case-by case basis. This holding is not consistent with *Casey*'s affirmation of the State's legitimate interest in protecting both maternal and fetal health from the outset of the pregnancy. 505 U.S. at 846. Furthermore, the appellate court's decision is not consistent with the State's power to restrict abortions after viability and *Casey*'s acceptance of the reality that lines must be drawn "within tolerable limits." *Id.* at 870. Just as the Court, in *Roe,* drew a "reasoned" line, "elaborated with great care," *id.*, the Utah Legislature has drawn a reasonable viability line that conforms with current scientific knowledge but still gives a woman ample time to terminate her pregnancy.

As this Court noted in *Casey,* courts must delineate specific rules from what, in the Constitution, is a general standard. *Id.* at 869-70. State legislatures also must be allowed to draw such lines so that they can provide the clarity necessary in criminal statutes regulating abortions. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (noting perils of criminal liability because of uncertainty of the viability determination).[7] However, with the abandonment of the trimester framework, how such lines are to be reviewed is unclear. Is a limitation on abortions based on a legislative judgment as to viability a regulation to which the "undue burden" analysis should be applied? If so, is the focus of the constitutional inquiry on all women seeking nontherapeutic abortions at any time prior to

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[7]The intentional performance of an abortion not authorized by Utah law is a third-degree felony. Utah Code Ann. § 76-7-314.

viability or only on those women, if any, who wait until they are 21 weeks pregnant? Must viability be assessed on a case-by-case basis by a physician, as the Tenth Circuit held, or can a state legislature make a legislative judgment on viability and prohibit abortion after a point in a woman's pregnancy when viability is reasonably possible?

While the Court may be understandably reluctant to review state statutes for the burdens each state may place on a woman's choice of a previability abortion, Utah's statute presents a question critical to the states' efforts to apply *Casey*. States need to know how to regulate abortions during the period of time when viability may be reasonably likely, but nonetheless uncertain, and when, as on the record here, doctors do not perform abortions unless necessary to protect maternal health or to prevent the birth of a child with grave defects. Utah's statute, and this case, could provide that much-needed guidance.

II. In holding that the Act's restrictions on late-term abortion are facially unconstitutional, the Court of Appeals made three critical errors that adversely impact how states may regulate abortions under *Casey*. First, the appellate court once again ignored the severability provision of the statute by erroneously concluding that the 1991 Utah Legislature intended to disregard controlling Supreme Court precedent. *Jane L.*, 102 F.3d at 1116, Pet.'s App. at A-10. Second, in applying the *Casey* undue burden standard, the Court of Appeals concluded that the statute affects only those women seeking nontherapeutic abortions of nonviable fetuses late in their term (21 or more weeks pregnant) as opposed to all women seeking such abortions at any time during their pregnancies. *Id.* at 1117, Pet.'s App. at A-11. Third, the Court of Appeals made an

independent factual finding that in 1990 there were such women as members in the group it defined as affected by the statute. Not only is this the wrong group for the constitutional inquiry, but this "fact" found by the Court of Appeals is contrary to undisputed facts relied on by the district court. Moreover, this "fact" is not supported by the record.

A. The Court of Appeals held that a legislative line, such as Utah's, that identifies viability at a certain point in pregnancy and prohibits nontherapeutic abortions thereafter is unconstitutional on its face. In large part, the court supported its holding by finding that the Utah Legislature enacted subsection 302(3) "with the specific purpose of placing an insurmountable obstacle in the path of a woman seeking a nontherapeutic abortion of a nonviable fetus after twenty weeks." *Jane L.*, 102 F.3d at 1116, Pet.'s App. at A-11. Referring to its earlier opinion, which was reversed by this Court, the appellate court reiterated its conclusion that the Utah Legislature intended to pass abortion provisions that would be a vehicle to challenging *Roe v. Wade* and "made a deliberate decision to disregard controlling Supreme Court precedent . . . ." *Id.* , Pet.'s App. at A-10.

The Court of Appeals' view of the intent of the Utah legislature, however, cannot be sustained in light of the statute's severability provision that expressly severed any provision found unconstitutional from the valid portions of the Act. The Tenth Circuit once again relied on the legislature's intent with respect to subsection 302(2) (conceded as unconstitutional after *Casey*) and once again ignored the legislative intent, unambiguously expressed in the severability clause enforced by this Court, to restrict abortions to the extent allowed by the Constitution and Supreme Court precedent.

B. In addition to holding that the statute had an improper purpose, the Court of Appeals concluded subsection 76-7-302(3) has an unconstitutional effect. In doing so, the appellate court misapplied *Casey's* undue burden analysis by erroneously narrowing the group of women upon whom the statute imposes a restriction. Instead of focusing on all women seeking abortions of nonviable fetuses at any time in their pregnancies, the court identified "those women seeking nontherapeutic abortions of nonviable fetuses after 20 weeks from conception" as the group adversely affected by the statute. *Id.*, Pet.'s App. at A-10. This narrowing of the affected class by the Tenth Circuit guaranteed that Utah's statute could not pass *Casey*'s undue burden test. Moreover, it demonstrates a critical misunderstanding of the proper focus of the constitutional inquiry in this case, and undermines the State's interest in protecting the woman's health and the life of the fetus that may become a child. *See Casey,* 505 U.S. at 894.

In reviewing Pennsylvania's spousal notification provision in *Casey*, the Court rejected the state's argument that only one percent of the plaintiff class was adversely affected by the statute because 20 percent of women who obtain abortions are married and 95 percent of those notify their husbands. Critical to the Court's conclusion, however, was the fact that "a significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases." *Id.*

In contrast, no woman in Utah wanting a previability abortion is prohibited or deterred by subsection 76-7-302(3) from obtaining one. The constitutional inquiry properly focuses on all women seeking nontherapeutic abortions at any time

during their pregnancies. Thus, the question after *Casey* is simply whether legislatively delineating viability at the end of 20 weeks post-conception and limiting abortions thereafter, *i.e.*, at the beginning of the 21st week of pregnancy, unduly burdens the constitutionally-protected right to choose abortion before viability. A woman affected by Utah's statute must choose to have a nontherapeutic abortion before she is 21 weeks pregnant. Given the difficulty of the procedure after that point in gestation--and the fact that Utah doctors do not perform such late-term abortions unless there is a medical reason rendering the abortion permissible under the Act--asking a woman to make her choice before the 21st week after conception is not an undue burden.

C. Based on undisputed facts, the district court concluded that subsection 302(3) does not impose an undue burden under *Casey* because the record contains no evidence that any woman wants or has attempted to obtain such a late nontherapeutic abortion in Utah, as well as no evidence that a physician would perform one not permitted by the Act:

> On the record before the Court, non-therapeutic abortions after the 20 week gestational period are not performed and have never been performed in Utah. Moreover, plaintiffs have submitted no evidence that any woman wants or has attempted to obtain such a late non-therapeutic abortion, and doctors generally avoid the trauma of such late abortions because of risks and difficulties to the woman and fetus.

Jane L., 809 F.Supp. at 873, Pet.'s App. at B-19. On appeal to the Tenth Circuit, Respondents did not claim that summary judgment was inappropriate on the ground that these facts were

disputed.[8] The Court of Appeals, however, disagreed with the district court's view of the record facts. After reviewing evidence that the Utah Women's Clinic "routinely refers to another state those Utah residents needing an abortion after twenty weeks" and that 10-15 such women had been referred out of state in 1990, the appellate court leaped to its own independent factual finding that "some members of this group are women seeking nontherapeutic abortions of nonviable fetuses." *Jane L.*, 102 F.3d at 1117, Pet.'s App. at A-12 (citing declaration of A. Porter, Utah Women's Clinic Director, Supp. App. of Aplees. at 158-60). This finding on appeal contradicts the fact relied on by the district court and undisputed in the record here, *i.e.*, that no woman who was 21 or more weeks pregnant had sought a nontherapeutic abortion in Utah. *Jane L.*, 809 F. Supp. at 869-70, 873, Pet.'s App. at B-19. As this Court has held, it is erroneous for an appellate court to ignore findings made by, and relied upon by, the district court and to engage in its own fact finding as support for a legal conclusion contrary to the district court's. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986); *e.g.*, *Citibank, N.A., v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 672 (1990).

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[8]While Respondents included a "factual statement" in their briefs to the Tenth Circuit, they have never attacked the district court's summary judgment in defendants' favor as incorrect on the ground that material factual disputes precluded summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Had they done so, successfully, the appropriate remedy on appeal would have been for the Tenth Circuit to vacate the summary judgment and remand the case to the district court for trial on the disputed issues of material fact. *E.g., Penrod v. Zavaras*, 94 F.3d 1399, 1405 (10th Cir. 1996); *United States v. Agri Services, Inc.*, 81 F.3d 1002, 1007-08 (10th Cir. 1996).

Even if the Court of Appeals could properly disregard the undisputed facts that were the basis of the district court's holding, the Tenth Circuit's record reference does not support its factual findings. In paragraph 6 of Ms. Porter's declaration, referred to by the appellate court, Ms. Porter describes three abortions performed after 19 weeks gestational age since 1989, all for severe fetal abnormalities. *Jane L.*, 809 F. Supp. at 869-70, Pet.'s App. at B-9. She then states that "Utah residents in need of abortion after 20 weeks are routinely referred to another state. For example, in 1990, the Clinic referred about ten to fifteen women who needed such abortions out of state, including some for fetal malformations." (Supp. App. of Aplees. at 158-60). From this statement, however, it cannot be determined if the women who were 21 or more weeks pregnant and referred out of state were seeking abortions allowed or not allowed under the statutory exceptions for maternal health.

Ms. Porter's deposition, however, offers some clarification. In her sworn testimony, she confirms the fact that the Utah Women's Clinic does not "perform abortions after 19 weeks gestation." According to Ms. Porter, the reason abortions are not performed after that time is that "there's a reporting requirement by the State to fill out a death certificate, and our physicians prefer not to do that." (Supp. App. of Aplees. at 104). Ms. Porter provided no evidence that the Clinic has referred to another state a woman seeking a nontherapeutic abortion after 20 weeks post-conception, as inferred by the Court of Appeals. Not a single witness testified that she wanted to obtain an abortion once she was 21 or more weeks pregnant, other than one that is permitted by Utah law. The Court of Appeals' factual finding cannot be sustained.

Moreover, even if the Court of Appeals' finding were correct--that 10-15 women 21 or more weeks pregnant and seeking nontherapeutic abortions have been referred out of state--the evidence is clear that the challenged statute is not the obstacle to the women seeking late-term abortions. The unwillingness of Utah physicians to do such abortions is the obstacle. Not a single physician testified that he or she would perform an abortion when a woman was 21 or more weeks pregnant that would be prohibited by the statute, regardless of fetal viability. Dr. Madhuri Shah of the Utah Women's Clinic testified that she does not generally perform abortions when a woman is 21 or more weeks pregnant because of the emotional difficulties and trauma they pose for her and for her patients. *Jane L.*, 809 F. Supp. at 870, Pet.'s App. at B-9-10; Aplee. Supp. App. at 101. According to Ms. Porter, Utah doctors will not perform abortions after 19 weeks because of a statutory requirement, not challenged here, that physicians file a death certificate in such cases. Thus, there is no basis for concluding that Utah's regulations on late-term abortions are constitutionally impermissible.

C. Although the Court of Appeals purported to invalidate Utah's restrictions on late-term abortions based on *Casey*'s undue burden analysis, the court held that pre-*Casey* Supreme Court precedents render facially unconstitutional a legislative line that identifies viability at a certain point in pregnancy.

The Court in *Casey* rejected the rigid trimester framework of *Roe*. 505 U.S. at 873. While there is dicta in the cases relied on by the Court of Appeals that would seem to invalidate Utah's line of demarcation based on gestational age, the application of those cases in this context is problematic. First, while both *Planned Parenthood v. Danforth*, 428 U.S. 52

(1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979), stated that it is not the role of either the legislature or the courts to place viability at a specific point in time, neither case addressed a statute in which a state had made such a legislative judgment on viability. In *Colautti*, the challenged statute required the person who performs an abortion to determine whether a fetus "may be viable" and to then use the degree of skill necessary to save the life of the fetus. The Court held the "may be viable" language to be vague and void on its face. 439 U.S. at 396. In *Danforth*, the Court rejected appellants' argument that a statute was invalid because the statutory definition of viability did not contain any reference to gestational time period and held that Missouri's definition of viability did not conflict with *Roe*. 428 U.S. at 63. While *Danforth* determined that *Roe* did not require a state legislature to define viability in terms of weeks, the issue of whether a state legislature could so define viability, consistent with the Constitution, was not before the Court in *Danforth*.

Furthermore, the language of *Danforth* and *Colautti* is not controlling in a post-*Webster*/post-*Casey* constitutional attack on a statute regulating abortion before viability. These more recent cases support legislative line-drawing in the abortion context as constitutionally permissible, so long as it is reasonable. In *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 515 (1989) (plurality opinion), the Court upheld a Missouri statute that "create[d] what is essentially a presumption of viability at 20 weeks [LMP]."[9] *Id.* at 527

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[9] The statute provided, in relevant part: "Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of 20 or more weeks gestational age, the (continued...)

(O'Connor, J., concurring in part II-D of the *Webster* judgment). As Justice O'Connor noted in her separate opinion, it is constitutionally permissible "for the State to enact regulations designed to protect the State's interest in potential life *when viability is possible.*" *Id.* at 528 (emphasis added). Similarly, the opinion in *Webster* authored by the Chief Justice and joined by Justices White and Kennedy stated that the statute was upheld because it was "*reasonably designed* to ensure that abortions are not performed when the fetus is viable." *Id.* at 520 (emphasis added). Possible viability is thus the measure of constitutional reasonableness.

Casey reaffirmed that the states have an important, legitimate interest in promoting and protecting the life or potential life of the unborn. 505 U.S. at 870, 875-76. The relevant question, in light of *Casey*'s abandonment of the trimester framework, is not whether a line demarking viability can be legislatively drawn, but whether the line that has been drawn is reasonable.

The line drawn by the Utah Legislature is consistent with the notion in *Casey* that a woman who fails to exercise her right to choose abortion before viability has consented to the state's intervention on behalf of the developing child. *Id.* A woman knows she is pregnant long before she reaches her 21st week of pregnancy, the point after which she will no longer be able to obtain an abortion on demand under subsection 76-7-302(3). If she does not choose to terminate her pregnancy before then, this Court's reasoning comes fairly into play. In

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(...continued)
physician shall first determine if the unborn child is viable . . . ." Mo. Rev. Stat. § 188.029 (1986).

other words, requiring a pregnant woman to exercise her right to choose a nontherapeutic abortion during the many weeks prior to the 21st week of pregnancy--after which the abortion process is difficult and traumatic without regard to fetal viability--is not a "significant obstacle to the woman's exercise of the right to choose." *Casey*, 505 U.S. at 877.

Finally, the establishment by statute of a specific point in time after which an unborn child will be deemed viable promotes clarity in a criminal statute. *See Colautti*, 439 U.S. at 395 (noting the perils of criminal liability because of the uncertainty of the determination of actual viability). Utah's law sets out a "bright line" end point to when nontherapeutic abortion is lawfully available to pregnant women and performable by abortion providers, rather than leaving a pregnant woman or her physician to guess at what percent chance of survivability an unborn child should be considered actually "viable."

CONCLUSION

For the foregoing reasons, the Utah Governor's and Attorney General's petition for writ of certiorari should be GRANTED.

CAROL CLAWSON
Utah Solicitor General
Counsel of Record

March 1997

PETITIONERS' APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANE L., on behalf of herself and all others similarly situated; UTAH WOMEN'S CLINIC, P.C.; PLANNED PARENTHOOD ASSOCIATION OF UTAH; DAVID HANSEN, M.D.; MADHURI SHAH, M.D.; JOHN CAREY, M.D.; DAN CHICHESTER, M.D.; KIRTLY PARKER JONES, M.D.; NEIL K. KOCHENOUR, M.D.; RHONDA LEHR, M.D.; CLAIRE LEONARD, M.D., KENNETH WARD, M.D.; BONNIE JEANNE BATY, M.D.; SUSAN ELIZABETH LYONS, L.C.S.W.; JANET LYNN WOLF, L.C.S.W.; LESLIE MCDONALDWHITE, L.C.S.W.; REVEREND DAVID BUTLER; REVEREND BARBARA HAMILTON-HOLWAY; REVEREND GEORGE H. LOWER; REVEREND LYLE D. SELLARDS; REVEREND DOCTOR ALAN CONDIE TULL; MARIE SOWARD GREEN; RABBI FREDERICK L. WENGER; JANE J. FREEDOM, (PSEUDO-NAME;) JULIE SPOUSE, (PSEUDO-NAME;) AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, UTAH SECTIONS; PENNY THOMPSON; WENDY EDWARDS,

Plaintiffs-Appellants

v.

NORMAN H. BANGERTER, as Governor of the State of Utah; PAUL VAN DAM, ATTORNEY GENERAL, as Attorney General of Utah,

Defendants-Appellees.

Nos.93-4044, 93-4059

ON REMAND FROM THE UNITED STATES SUPREME COURT

(D. Utah; D.C. No. 91-CV-345-G)

Before SEYMOUR, Chief Judge, PORFILIO, Circuit Judge, and BROWN, Senior District Judge.*

SEYMOUR, Chief Judge.

In *Jane L. v. Bangerter*, 61 F.3d 1493 (10th Cir. 1995) (*Jane L. IV*), this court considered the constitutionality of certain provisions of the Utah laws regulating abortions. The Utah statute setting out the circumstances under which an abortion was permitted contained one section regulating abortions occurring before twenty weeks gestational age, *see* Utah Code Ann. § 76-7-302(2) (1995), and one section regulating abortions after twenty weeks gestational age, *see id.* § 302(3). The district court had declared section 302(2) unconstitutional, *see Jane L. v. Bangerter*, 809 F. Supp 865, 870 (D. Utah 1992) (*Jane L. III*), and defendants did not challenge that ruling. Plaintiffs argued on appeal that section 302(3) was not severable from section 302(2), and that section 302(3) was therefore invalid along with section 302(2). In the alternative, plaintiffs contended that if section 302(3) were

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* Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

severable, it was nonetheless unconstitutional on its face. We determined as a matter of Utah law that the provisions were not severable and invalidated section 302(3) on that basis. *See Jane L. IV*, 61 F.3d at 1496-99. Accordingly, we did not address the constitutionality of section 302(3) standing alone. *See id.* at 1497 n.3.

The Supreme Court granted certiorari and limited its review to our holding that the two provisions of the Utah statute were not severable. The Court summarily reversed the judgment as to that issue, and remanded the case to us for further proceedings. *See Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996) (per curiam). The only issue before us on remand is the one we did not previously reach:[1] the constitutionality of Utah's attempt to regulate abortions after twenty weeks gestational age as set out in section 302(3).[2]

Section 302(3) provides: "After 20 weeks gestational age, measured from the date of conception, an abortion may be

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[1] In addition to holding that Utah Code Ann. § 76-7- 302(3) (1995) was not severable, we also held that the provision on fetal experimentation, *id.* § 310, was unconstitutionally vague, and that the sections governing the choice of methods for postviability abortions, *id.* §§ 307, 308, were unconstitutional. *See Jane L. IV*, 61 F.3d at 1499-1505. The Supreme Court expressly did not review those rulings and we do not revisit them here.

[2] The panel heard argument on this issue before deciding *Jane L. IV*. We have determined unanimously that additional oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9.

performed only for those purposes and circumstances described in Subsections 2(a), (d) and (e)." Utah Code Ann. § 76-7-302(3).[3] Under the listed subsections, an abortion is allowed when necessary to save the pregnant woman's life, *id.* § 302(2)(a), to prevent grave damage to the pregnant woman's health, *id.* § 302(2)(d), or to prevent the birth of a child with grave defects, *id.* § 302(2)(e). The parties agree that section 302(3) embodies a legislative judgment equating viability with twenty weeks gestational age as measured from conception, and on that basis restricts the availability of abortion after twenty weeks to three narrow circumstances. The district court held that section 302(3) did not constitute an undue burden on a woman's right to choose under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), because the record before the court contained no evidence that nontherapeutic abortions after twenty weeks had ever been performed in Utah, or that any woman in Utah wants or has ever attempted to obtain an abortion that late in her pregnancy. Plaintiffs contend on appeal that, by establishing a date of viability, the statute stands in direct conflict with controlling Supreme Court precedent, and that the statute imposes an undue burden prohibited by *Casey*. Defendants assert to the contrary that under *Casey* a state may establish a presumption of viability.

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[3] Gestational age is generally "determined by computing the time from the first day of the last menstrual period [lmp]." 2 J.E. Schmidt, M.D., Attorneys' Dictionary of Medicine at G- 63 (1996). Utah law, however, measures gestational age differently and perhaps uniquely by computing it from the date of conception. Thus, "20 weeks gestational age" as used in section 302(3) equates with 22 weeks gestational age as this computation is generally made.

In *Casey*, the Supreme Court reaffirmed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), that

> viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe's* factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.

Casey, 505 U.S. at 860.

After the decision in *Roe*, the Supreme Court addressed the critical definition of viability in a series of cases. In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), the Court stated it had "recognized in *Roe* that viability was a matter of medical judgment, skill, and technical ability, and we preserved the flexibility of the term." *Id.* at 64. Accordingly, the Court held:

> [I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each

> pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id.

In *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court reviewed its holdings in *Roe*, its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), and *Danforth*, and pointed out that those cases had "stressed viability, [and] declared its determination to be a matter for medical judgment." 439 U.S. at 388.

> We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability--be it weeks of gestation or fetal weight or any other single factor--as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viability one way or the other.

Id. at 388-89. Finally, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), the Court reiterated its holdings in *Danforth* and *Colautti* that the determination of viability is a matter for the judgment of the attending physician, and that therefore the legislature could not give one element, such as

gestational age, dispositive weight. *See id.* at 516-17 (plurality); *id.* at 526-27 (O'Connor, J., concurring); *id.* at 545 n.6 (Blackmun, J., joined by Brennan, J., and Marshall, J., concurring and dissenting).

It is indisputable that section 302(3) of the Utah abortion statute, which effectively defines viability as occurring at twenty weeks gestational age, is directly contrary to the Supreme Court authority set out above. Defendants argue that the section nonetheless passes constitutional muster under *Casey*. In deciding that issue, we must first determine the standard of review applicable after *Casey*.

In *Casey*, the Court held that "[o]nly where state regulation imposes an undue burden on a woman's ability to [choose to terminate or continue her pregnancy before viability] does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Casey*, 505 U.S. at 874. In so doing, the Court expressly rejected the strict scrutiny standard applied by cases after *Roe* to evaluate regulations bearing upon the abortion decision. *See id.* at 871. Plaintiffs argue that the Court's rejection of strict scrutiny was directed only to previability abortions, and that this standard still governs in the context of postviability abortions. We believe this argument misperceives the nature of the alleged constitutional flaw in section 302(3). If that section is constitutionally impermissible, it is because by mandating a definition of viability that may not be correct in a given case, it impacts the choice of a woman whose fetus remains nonviable after twenty weeks from conception. The section therefore is most properly analyzed under the standard applicable to previability regulations.

That determination does not end the inquiry, however, because the standard applicable to previability regulations after *Casey* is a matter of some dispute. *See Planned Parenthood v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (noting split in circuits and among Justices). The district court in this case appears to have applied the test set out in *United States v. Salerno*, 481 U.S. 739, 745 (1987), which requires the challenger to establish that no set of circumstances exists under which the law would be valid. *See Jane L. III*, 809 F. Supp. at 871-72, 878 & n.33. Although the Court in *Casey* did not expressly reject the *Salerno* test, it did not apply it. Instead the Court evaluated the regulations under the "undue burden" standard, which invalidates a state regulation that has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877. In articulating the "undue burden" standard, the Court stated that it was "set[ting] forth a standard of general applicability." *Casey*, 505 U.S. at 876. We therefore agree with the Eighth Circuit in *Miller*, 63 F.3d at 1458, that the proper test after *Casey* is the "undue burden" standard applied by the Court in that case.[4]

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[4] The undue burden test is meant to evaluate the constitutionality of regulations that burden a woman's right to choose a previability abortion. Section 302(3) does much more than pose an obstacle to that choice. It defines viability in terms of gestational age. For a woman seeking the nontherapeutic abortion of a fetus that is not viable despite fitting the statutory definition in section 302(3), however, that section goes beyond creating a hindrance and imposes an outright ban. Rather than apply *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in these circumstances, it may be more appropriate simply to conclude that the section is invalid as contrary to controlling Supreme Court precedent precluding a legislature from defining the critical fact of viability as Utah has done here. In any

Under *Casey*, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. at 878. "A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* at 877. "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was `the predominant factor motivating the legislature's decision.' Such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment." *Armstrong v. Mazurek*, 94 F.3d 566, 567 (9th Cir. 1996) (quoting *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995) and citing *Shaw v. Hunt*, 116 S. Ct. 1894, 1899-1901 (1996)).[5] As we pointed out in *Jane L. IV*, 61 F.3d at 1495, the

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event, as we discuss in text, section 302(3) is clearly invalid under *Casey* as having both the purpose and effect of placing a substantial burden on a woman's decision to choose a previability abortion.

[5] Neither the district court nor the State has focused on the fact that under *Casey*, a law is invalid if either its purpose or effect is to place a substantial obstacle in the path of a woman seeking to abort a nonviable fetus. *See Casey*, 505 U.S. at 877. The district court did not analyze the purpose of section 302(3) in assessing whether it poses an undue burden, addressing only its effect. *See Jane L. v. Bangerter*, 809 F. Supp. 805, 873- 74 (D. Utah 1992) (*Jane L. III*). The State makes only a passing reference to purpose on appeal. Indeed, as we point out in text, to the extent the State addresses purpose at all, it concedes that the section's purpose is to prevent the abortion of nonviable fetuses after 20 weeks from conception.

Utah legislature's intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade*, as demonstrated by the legislature's establishment of an abortion litigation trust account. In so doing, the State made a deliberate decision to disregard controlling Supreme Court precedent set out in *Roe, Danforth, Colautti*, and *Webster*, and to ignore the Supreme Court's repeated directive that viability is a matter for an attending physician to determine.[6] In our view, the State's determination to define viability in a manner specifically and repeatedly condemned by the Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable. This intent is confirmed by the State's briefs on appeal, in which the State in essence concedes that the section was intended to prevent the nontherapeutic abortion of nonviable fetuses after twenty weeks because in the State's view women who seek such abortions have waited too long. Contrary to the Court's reaffirmation in *Casey* that a woman has a right to terminate her pregnancy before viability, *see Casey*, 505 U.S.

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[6] The State contends these cases are no longer valid after *Casey* to the extent they commit the determination of viability to the medical judgment of the attending physician and prohibit a legislature from defining viability in terms of gestational age. To the contrary, we view the Court's reaffirmation in *Casey* that "[w]henever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided," 505 U.S. at 860, coupled with the Court's failure to disturb clear past precedent on how viability is to be determined, as convincing indications that those precedents still govern the issue. Moreover, it is important to emphasize that the Utah provisions were passed before *Casey* was handed down. Consequently, *Casey's* effect on these cases sheds no light on the State's purpose in passing legislation in direct conflict with them.

at 870-71, the State defends section 302(3) because it "requir[es] pregnant women to exercise their right to choose nontherapeutic abortion during the many weeks prior to the 21st week postconception--after which the abortion process is difficult and traumatic without regard to fetal viability." Br. of Aplees. on Remand, at 21 (emphasis added). In sum, we conclude that section 302(3) was enacted with the specific purpose of placing an insurmountable obstacle in the path of a woman seeking the nontherapeutic abortion of a nonviable fetus after twenty weeks, and it therefore imposes an unconstitutional undue burden on her right to choose under *Casey*.

We also conclude that the section is invalid because it has an impermissible effect. "[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Casey*, 505 U.S. at 877. The Supreme Court made clear in *Casey* that in determining effect, "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* at 894. In addressing whether section 302(3) is an undue burden, therefore, *Casey* instructs us that we must assess its impact on the women upon whom it operates, that is, those women seeking nontherapeutic abortions of nonviable fetuses after twenty weeks from conception. For those women, section 302(3) imposes more than a substantial obstacle; it constitutes an outright ban.

The district court held as a matter of law that section 302(3) nevertheless does not impose an undue burden under

Casey because the record contains no evidence that any woman wants or has attempted to obtain such a late nontherapeutic abortion in Utah. *Jane L. III*, 809 F. Supp. at 873. Plaintiffs contend that the lower court's view of the record for summary judgment purposes is erroneous. We agree. The record contains evidence through the declaration of the director of the Utah Women's Health Clinic, a facility that performs approximately seventy-five percent of the abortions in Utah, that the Clinic routinely refers to another state those Utah residents needing an abortion after twenty weeks. She stated that in 1990, for example, the Clinic referred out of state ten to fifteen women who needed such abortions. Supp. App. of Aplees., at 158-60. While this and other evidence in the record indicate that the number of women in Utah desiring abortions after twenty weeks may be small, the undisputed evidence also demonstrates that some members of this group are women seeking nontherapeutic abortions of nonviable fetuses. It is thus apparent that a group of women exists in Utah for whom section 302(3) actually operates as an impermissible ban on the right to abort a nonviable fetus.

We accordingly hold that section 302(3) has both the purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus. It therefore imposes an undue burden on a woman's right to choose. The State's arguments to the contrary are disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority holding that viability is a matter to be determined by an attending physician, and that until viability is actually present the State may not prevent a woman from choosing to abort.

In sum, we hold that section 302(3) is unconstitutional

in that it unduly burdens a woman's right to choose to abort a nonviable fetus.[7] For the reasons set out in our prior opinion, 61 F.3d at 1505, as modified herein, we AFFIRM the judgment of the district court in part and REVERSE in part.

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[7] Because we strike down section 302(3) as unconstitutional, we need not reach plaintiffs' challenge to one of the circumstances in which a woman may obtain a postviability abortion. Under section 302(3), such an abortion is permitted, inter alia, to prevent grave damage to the woman's health. Plaintiffs argue that this provision goes beyond the holding in *Roe*, reaffirmed in *Casey*, that a State may proscribe postviability "abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164- 65).

We note nevertheless that we addressed identical language in *Jane L. IV* when considering the constitutionality of the Utah provisions governing a doctor's choice of methods for performing postviability abortions. *See Jane L. IV*, 61 F.3d at 1502- 05. Those provisions would "require a doctor to use the abortion method that would best assure the unborn child's chances of survival unless such a method would gravely damage a woman's health." *Id.* at 1503. We held that "[b]y requiring a woman to suffer `grave damage' to her health before her liberty interests predominate, the Utah legislature violated those portions of *Roe* and *Thornburgh [v. American College of Obstetricians & Gynecologists*, 476 U.S. 747(1986)] that *Casey* reaffirmed, and unconstitutionally devalued a woman's privacy rights." *Jane L. IV*, 61 F.3d at 1504.

JANE L., on behalf of herself and all others similarly situated; UTAH WOMEN'S CLINIC, P.C.; PLANNED PARENTHOOD ASSOCIATION OF UTAH; DAVID HANSEN, M.D.; MADHURI SHAH, M.D.; JOHN CAREY, M.D.; DAN CHICHESTER, M.D.; KIRTLY PARKER JONES, M.D.; KATHLEEN KENNEDY, M.D.; NEIL K. KOCHENOUR, M.D.; RHONDA LEHR, M.D.; CLAIRE LEONARD, M.D.; KENNETH WARD, M.D.; BONNIE JEANNE BATY, M.D.; SUSAN ELIZABETH LYONS, L.C.S.W.; JANET LYNN WOLF, L.C.S.W.; LESLIE MCDONALD-WHITE, L.C.S.W.; REVEREND DAVID BUTLER; REVEREND BARBARA HAMILTON-HOLWAY; REVEREND GEORGE H. LOWER; REVEREND LYLE D. SELLARDS; REVEREND DOCTOR ALAN CONDIE TULL; REVEREND MARIE SOWARD GREEN; RABBI FREDERICK L. WENGER; JANE J. FREEDOM, (PSEUDO-NAME;) JULIE SPOUSE, (PSEUDO-NAME;) AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, UTAH SECTIONS; PENNY THOMPSON; WENDY EDWARDS,

Plaintiffs-Appellants,

v.

NORMAN H. BANGERTER, as Governor of the State of Utah; PAUL VAN DAM, ATTORNEY GENERAL, as Attorney General of Utah,

Defendants-Appellees.

Civ. No. 91-C-345G

United States District Court

D. Utah, D.C.

Dec. 17, 1992

Janet Benshoof, Rachael Pine, Eve Gartner, New York City, Jeffrey Oritt, Howard Lundgren, Salt Lake City, UT, and Simon Heller, New York City, for plaintiffs.

Mary Anne Wood, Anthony Quinn, James Soper, Paul Durham and Kay Balmforth, Salt Lake City, UT, for defendants.

MEMORANDUM DECISION AND ORDER III-IN RE PORTIONS OF MOTION FOR SUMMARY JUDGMENT

GREENE, J. Thomas, District Judge

This matter came regularly before the Court on April 10, 1992, on defendants' Motion for Summary Judgment. Plaintiffs were represented by Janet Benshoof, Rachel Pine, Eve Gartner, Jeffrey Oritt, Howard Lundgren and Simon Heller. Mary Anne Wood, Anthony Quinn, James Soper, Paul Durham and Kay Balmforth appeared for defendants. Extensive oral argument was heard, after which bench rulings were rendered and later supplemented as to several issues,[1] and the Court took certain other issues under advisement pending resolution by the Supreme Court of *Planned Parenthood v. Casey*, --- U.S. ---, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). After that case was

[1] The bench rulings were memorialized in orders issued April 10, 1992 and supplemented along with other rulings in two Memorandum Decisions. *Jane L. v. Bangerter*, 794 F.Supp. 1528 (D.Utah 1992); *Jane L. v. Bangerter*, 794 F.Supp. 1537 (D.Utah 1992).

decided on June 29, 1992, the parties were permitted to file further memoranda concerning the impact of *Casey* upon the matters under advisement.

Now being fully advised, the Court enters its Memorandum Decision and Order.

STATUTORY BACKGROUND

During the 1990 General Session of the Utah legislature, three bills to restrict abortion were introduced.[2] The Legislature did not formally consider these bills, but decided to study the issue further. To this end, the legislature adopted a resolution, HJR 39, "Abortion Limitation Resolution," stating that the policy of the legislature was to favor childbirth over abortion and to restrict abortion to the extent the Constitution would permit. This resolution established the "Abortion Task Force Committee," composed of fourteen members of the Utah House and Senate. The Task Force committee held a series of hearings throughout the spring and summer of 1990. Experts in the fields of medicine, law, philosophy, public policy, and political science were invited to testify and to submit data relating to possible abortion legislation. In addition, the Task Force conducted nine public hearings throughout the state in order to elicit public comment on various legislative options concerning abortion. Following these hearings, Senate Bill No. 23, entitled "An Act Relating to Abortion; Prohibiting Abortion

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[2] House Bill 446, House Bill 171 and Senate Bill 270. *See* Journal of the House of Representatives of the State of Utah, Forty-Eighth Legislature, 1990 General Session at 146, 654; State of Utah, Senate Journal, 1990 General Session of the Forty-Eighth Legislature at 605.

Except Under Specified Circumstances," was sponsored by Sen. McAllister, debated and passed within four days, and signed into law by the Governor of Utah on January 25, 1991.

On April 4, 1991, plaintiffs in this action filed a complaint for declaratory judgment and injunctive relief against enforcement of portions of the new and existing Utah Abortion Acts. Shortly thereafter, Senate Bill 23 was amended by Senate Bill 4,[3] and adopted by the Utah legislature in a four hour special session held on April 17, 1991. On May 15, 1991, plaintiffs filed an eight count Amended Complaint seeking invalidation of the entire new Act, and invalidation of certain sections of the Utah Abortion Act of 1974. This Court enjoined enforcement of the challenged provisions of the Utah Abortion Acts pending determination of the merits of this litigation.

An extensive record was developed and filed with the Court presenting legislative and historical facts relating to abortions, pregnancies and the Utah statutes in which the liberty interest of women in making the choice to have an abortion is balanced against the state's interest in protecting unborn children. Professional and expert opinions, statistics, social and economic data, and information concerning medical health, religious, family and psychological impacts were set forth in depositions, written summaries, exhibits and other documents all of which were verified and lodged with the Court.

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[3] Among other things, Senate Bill No. 4 expressly eliminated criminal liability for the woman obtaining an abortion, amended the rape and incest reporting requirements, changed the wording in section 76-7-307 and -308 from "serious and permanent" damage to "grave" damage, and added the requirement that only "intentional" performance of an unauthorized abortion would result in criminal penalties.

The Utah statutes which were taken under advisement after extensive argument on defendants' Motion for Summary Judgment are as follows:

> 76-7-302. Circumstances under which abortion authorized.
>
> (1) An abortion may be performed in this state only by a physician licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act and, if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.
>
> (2) An abortion may be performed in this state only under the following circumstances:
>
> > (a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;
> >
> > (b) the pregnancy is the result of rape or rape of a child, as defined by Section 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406(10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d) and (e).

(4) The name of a victim reported pursuant to Subsection (b) or (c) is confidential and may not be revealed by law enforcement or any other party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

76-7-304. Considerations by physician--Notice to minor's parents or guardian or married woman's husband.

To enable the physician to exercise his best medical judgment, he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) her physical, emotional and psychological health and safety,

(b) her age,

(c) her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

76-7-307. Medical procedure required to save life of unborn child.

If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure that unborn child may be used unless necessary, in the opinion of the

woman's physician, to prevent grave damage to her medical health.

76-7-308. Medical skills required to preserve the life of unborn child.

Consistent with the purpose of saving the life of the woman or preventing grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

76-7-315. Exceptions to certain requirements in serious medical emergency:

When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) or Subsection 76-7-305(2), the provisions of those sections do not apply.

BACKGROUND FACTS

The following non-adjudicative, legislative or undisputed facts[4] pertinent to certain matters under advisement support the rulings made herein:

*Utah has kept some of the most meticulous, complete, and accurate abortion statistics in the nation. Brockert Test.

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[4] *See* discussion in *Jane L. v. Bangerter*, 794 F.Supp. 1537, 1540-1541 (D. Utah 1992).

¶¶ 5, 10-11.

*The duration of a pregnancy can be measured from the last menstrual period (LMP) or from conception. Calculation of conception age begins 2 weeks later than LMP. *See, e.g.*, F. Gary Cunningham, Paul C. MacDonald and Norman F. Gant, Williams Obstetrics at 87 (18th ed. 1989). (Defs.' Supp.Mem. of 10/4/92 Ex.B.)

*The Utah legislature calculated gestation age "measured from the date of conception...." Utah Code Ann. § 76-7-302(3) (Supp.1991).

*The statutory cut-off for non-therapeutic abortions is after 20 weeks, which is 21 weeks from the date of conception or 23 weeks LMP. Utah Code Ann. § 76-7-302(3) (Supp.1991).

*Survival as early as 21 weeks gestational age (23 weeks LMP) is possible. Williams Obstetrics, supra, note 1, at 747-48.

*At twenty weeks gestational age, the unborn child is fully developed and is simply maturing in the womb. See Defs.' Trial Ex. A. By twenty weeks gestational age, even the eyelids, eyebrows and fingernails of the unborn child are well developed. DeVore Summ. at 13.

*Based on the record before this Court, there has never been a non-therapeutic abortion performed in the State of Utah after 20 weeks gestational age. Defs.' Trial Ex. G-T.

*If a viable child is aborted and survives, it almost

always suffers impairment as a result of prematurity. Williams Obstetrics supra note 1, at 747-48.

*The Utah Women's Clinic, since 1989, performed abortions on only three fetuses after nineteen weeks gestational age, all for severe abnormalities. Pls.' Mem.Opp'n Defs' Mot.Summ. J. Porter Decl. at 2.

*The principal abortionist in the State of Utah, Dr. Madhuri Shah of the Utah Women's Clinic, does not do abortions after 20 weeks gestational age because of the difficulties they pose for herself and her patients. Shah Dep. at 71: 12-21.

*Dilatation and extraction ("D and E") is the safest form of interruption of pregnancy in the second trimester, but it is a technique that requires skilled physicians who perform this procedure on a regular basis. While a number of physicians throughout the United States perform D and E's up through 22 weeks of gestation, there are only a handful of individuals with expertise beyond 22 weeks. Because of the expertise required, this is not a common procedure performed after 22 weeks in the majority of cities throughout the United States. DeVore Summ. at 33.

*Few physicians are willing to perform late term D and E procedures because the fetus is torn into bits and pieces. *Id.*

*The more common practice is vaginal delivery through induction of labor. *Id.* at 34.

*After 22 to 24 weeks gestational period, the difference in the mortality rate between vaginal delivery an D & E is

insignificant. DeVore Dep. at 16-17.

The Utah statutes will now be analyzed to determine whether they pass muster in the light of the Supreme Court's ruling in *Planned Parenthood v. Casey*, --- U.S. ---, 112 S.Ct.2791, 120 L.Ed.2d 674 (1992).

ANALYSIS

1. Pre-Viability Abortions

[1] Defendants have conceded that the Utah statutory ban on abortions, at least as it relates to non-therapeutic abortions prior to viability of the fetus, "appears to be unconstitutional"[5] under the guidelines established by the Joint Opinion in *Planned Parenthood v. Casey*, --- U.S. ---, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).[6] In that case, a majority of the Supreme Court reaffirmed the "essential holding" of *Roe v. Wade* in all of its three parts, as follows:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect

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[5] Defendants' Supplemental Reply Brief dated September 14, 1992, at 2.

[6] The Joint Opinion was authored by Justices O'Connor, Kennedy and Souter. Justices Stevens and Blackmun concurred in recognizing the right of women to choose abortion before viability free from any undue burden imposed by the state.

> the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. at ---, 112 S.Ct. at 2804. The first part of the reaffirmed *Roe* opinion controls the decision here rendered as to pre-viability abortions. Manifestly, the outright ban (with certain statutory exceptions) as mandated by the Utah statute on abortions by demand prior to the 21 week gestation age would constitute departure from "the essence of Roe's original decision," affirmed by the dicta of the majority in *Casey*.

As the Court noted in *Casey*, judges do not have the right or obligation to "mandate our own moral code." *Id.* at ---, 112 S.Ct. at 2806. Accordingly, this Court holds that Utah Code Ann. § 76-7-302(2) (Supp.1991) insofar as it relates to pre-viability abortions before 21 weeks gestational age constitutes an unconstitutional infringement on a woman's liberty interest under the Due Process Clause of the Fourteenth Amendment.[7]

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[7] In *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), the Fifth Circuit struck down a Louisiana statute banning abortions except to preserve the life or health of an unborn baby, remove a dead child, save the life of the mother, or when the pregnancy is the result of rape or incest and certain reporting requirements are met. The Louisiana statute prohibited all abortions, so as written it was

2. Post-Viability Abortions

In a separate section of the 1991 abortion statute, the Utah Legislature adopted the period "after 20 weeks gestational age" (23 weeks LMP) as the point beyond which abortions could not be performed, except to protect the mother's life, to prevent grave damage to maternal health or to prevent grave birth defects. Utah Code Ann. § 76-7-302(3).

a. Severability of § 76-7-302(3)

[2] Plaintiffs have urged that because *Casey* invalidates section 76-7-302(2), and because section 76-7-302(3) incorporates part of the invalidated statute (subsections 2(a), (d) and (e)), section 76-7-302(3) must also be struck down as unconstitutional. This argument lacks merit. Subsections (a), (d) and (e) have only been invalidated by this Court as they relate to the ban on pre-viability abortions in section 76-7-302(2). In any event, those subsections are a part of section 76-7-302(3) as to post-viability abortions by reference and stand independent of the provisions of Utah Code Ann. 76-7-302(2) as to pre-viability abortions. Under section 76-7-302(3), the subsections constitute the "purposes and circumstances" under which post viability abortions may be performed.

The Utah legislature enacted a severability clause relative to the abortion statute which would preserve every "provision, section, subsection, sentence, clause, phrase or

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declared to be facially unconstitutional. The court did not address the distinction between pre-viable and post-viable fetuses which comes into play under the Utah statute.

word" not declared unconstitutional.[8] The Utah Supreme Court has held that a section of a statute may be severed from an invalidated statute if "the remaining portions of the act can stand alone and serve a legitimate purpose." *Berry v. Beech Aircraft*, 717 P.2d 670, 686 (Utah 1985). Accord, *Utah Technology Finance Corp. v. Wilkinson*, 723 P.2d 406, 414 (Utah 1986). In this case the post-viability requirements are entirely separate from the pre-viability requirements, and can stand alone. As for the requirement that subsection 76-7-302(3) serve a legitimate purpose, the Supreme Court recognized in *Roe* that a state can prohibit abortion after viability as long as there are exceptions, as there are here, "when it is necessary to preserve the life or health of the mother." *Roe v. Wade*, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973).

b. Facial Challenge

[3, 4] The well-established rule of the Supreme Court concerning facial challenges has application here: "[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can be constitutionally

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[8] Utah Code Ann. § 76-7-317 provides:

If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

applied." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).[9] This rule was not applied as such by the majority of the Supreme Court in *Casey*. Instead, it seems that in some contexts the majority, sub silentio, abandoned the traditional facial challenge approach in favor of an undue burden standard.[10] It is therefore unclear whether the majority would refuse to apply traditional facial challenge analysis to all pre-viability, non-therapeutic abortions.[11] It appears to this Court that such analysis has forceful application in late abortions at or near the viability line.

Justice Scalia pointed out in connection with the Supreme Court's recent refusal to grant certiorari in *Ada v. Guam Society of Obstetricians & Gynecologists*, --- U.S. ---, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992), that *Casey* did not alter such facial challenge analysis, and said:

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[9] *See* discussion of facial challenge in the context of Utah's "serious medical emergency" statute, infra at 877-878.

[10] In the context of Pennsylvania's 24 hour waiting period statute, the Court appears to have combined facial challenge analysis with the undue burden test. However, with regard to the spousal notification statute, the Court did not determine whether the law had any constitutional applications as *Salerno* requires. The Court stated instead that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, --- U.S. at ---, 112 S.Ct. at 2829. *See* discussion at note 27.

[11] The Court in *Casey* observed that, "[a] finding of undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, --- U.S. at ---, 112 S.Ct. at 2820 (emphasis added).

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting-through judicial decision or enforcement discretion-statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Id. at ---, 113 S.Ct. at 634. While this observation was made in dissent, joined by the Chief Justice and Justice White, it reiterates the familiar rule of law which continues to be binding upon lower courts.

It is clear that the Utah statute can be applied constitutionally in the vast majority of cases. This is because the Utah statutory prohibition of abortions at 21 weeks gestational age corresponds with the time when the unborn child is capable of independent existence, being fully developed and simply maturing in the womb. As to such fetal life, the statute amply withstands a facial challenge. To strike it down based upon an implausible scenario of abortions of unviable fetuses after 20 weeks[12] would require this Court impermissibly to resort to the doctrine of "overbreadth." The Supreme Court has consistently refused to apply the doctrine of overbreadth beyond the First Amendment context. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (citations omitted). *See also*, *Rust v. Sullivan*, --- U.S. ---, ---, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991).

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[12] Based on the record before the Court, there have been no cases of non-therapeutic abortions after 20 weeks in Utah.

c. Viability

The Court in *Casey* fixed the point of viability as a fair and appropriate line of demarcation wherein the interest of the State in unborn children exceeds the liberty interest of a woman in the abortion choice. In this regard, the majority in *Casey* declared that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions," --- U.S. at ---, 112 S.Ct. at 2811 (emphasis added), and that viability constitutes the point at which "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection...." *Id.* at ---, 112 S.Ct. at 2817 (emphasis added).

A compelling reason set forth in *Casey* to uphold limitations or restrictions on post-viability abortions is that by then a woman may fairly be deemed to have consented to the exercise of the state's interest in protection of life. The three authors of the Joint Opinion said in this regard:

> The viability line also has, as a practical matter, an element of fairness. In some board sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

Id. at ---, 112 S.Ct. at 2817.

In establishing the viability line, the court in *Casey* rejected the "rigid trimester framework of *Roe v. Wade*." *Id.* ---, 112 S.Ct. at 2821. Dicta set forth in cases which derived from

the trimester framework would seem to invalidate Utah's line of demarcation based upon gestational age.[13] However, in a more recent case the Supreme Court upheld a Missouri statute[14] which "create[d] what is essentially a presumption of viability at 20 weeks." *Webster v. Reproductive Health Service*, 492 U.S. 490, 515, 109 S.Ct. 3040, 3055, 106 L.Ed.2d 410 (1989).[15]

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[13] In *Planned parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court stated, "it is not the proper function of the legislature or the courts to place viability ... at a specific point in the gestation period." In *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), the Court reiterated this position and stated,

> Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability--be it weeks of gestation or fetal weight or any other single factor--as the determinant of when the State has a compelling interest in the life or health of the fetus. *Id.* at 388-89, 99 S.Ct. at 682.

[14] The statute in *Webster* provided in relevant part:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable....
> Mo.Rev.Stat. § 188.029 (1986).

[15] In *Webster*, Chief Justice Rehnquist referred to previous trimester-based cases and said,

> We think the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti*

The statute in *Webster* was upheld in an opinion by the Chief Justice, joined by Justices White and Kennedy, because it was "reasonably designed to ensure that abortions are not performed when the fetus is viable." 492 U.S. at 520, 109 S.Ct. at 3058. Justice O'Connor concurred in the judgment as to this part (II-D) of the opinion, stating, "all nine members of the Thornburgh court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible." *Id.* at 528, 109 S.Ct. at 3062 (emphasis added). Justice Scalia also concurred in the judgment.

The Utah statute was reasonably designed to take effect at a time when life outside the womb is possible. In this regard, the gestational age line drawn in the Utah statute corresponds with the time of possible fetal survival. The Court in *Casey* observed that given the advances in neonatal care since the era of *Roe*, viability may now be reached at "23 to 24 weeks," --- U.S. at ---, 112 S.Ct. at 2811. This is the equivalent of 21 to 22 weeks gestational age (23 to 24 weeks LMP) as defined in the Utah statute.[16]

> *and Akron[v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687] making constitutional law in this area a virtual Procrustean bed.

Id. at 517, 109 S.Ct. at 3056. In *Casey*, a majority of the Supreme Court joined in abandoning the trimester framework. Supreme Court joined in abandoning the trimester framework. --- U.S. at ---, 112 S.Ct. at 2808. *See* discussion at 874-875, infra.

[16] The Utah prohibition takes effect "after 20 weeks gestational age,# which at the earliest would be 21 weeks gestational age. Utah Code Ann. § 76-7-302(3) (Supp.1991).

d. Undue Burden

On the record before the Court, non-therapeutic abortions after the 20 week gestational period are not performed and have never been performed in Utah. Moreover, plaintiffs have submitted no evidence that any woman wants or has attempted to obtain such a late non-therapeutic abortion, and doctors generally avoid the trauma of such late abortions because of risks and difficulties to the woman and fetus. Therefore, under the *Casey* rationale, the statutory provision is not "likely to prevent a significant number of women from obtaining an abortion," nor can it be found that "for many women, it will impose a substantial obstacle." *Id.* at ---, 112 S.Ct. at 2829. Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.

Based upon the foregoing, and on the record presented, it seems clear that Utah's prohibition of such late, non-therapeutic abortions does not impose an undue burden on a woman's liberty interest, whether the fetus is non-viable or viable after the 20 week period.[17]

3. Standards Physicians are Required to Follow When

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[17] Plaintiffs have also challenged the requirement in section 76-7-302(3) that the fetus' life be favored except when necessary to prevent "grave damage" to the mother's health. They claim this is inconsistent with *Casey's* mandate that the woman's health not be "endangered." *Casey*, --- U.S. at ---, 112 S.Ct. at 2804. This Court has upheld the constitutionality of the use of "grave damage" in a similar context infra, at note 20. That analysis applies with equal force here.

Aborting a Potentially Viable Fetus

Two provisions[18] in the Utah law require that the medical procedure and the medical skills used in a post-viability abortion must be calculated, in the "best medical judgment of the physician,"[19] to give the unborn child the "best chance of survival," while at the same time preventing the pregnant woman's death or grave damage to her health.

[5] Plaintiffs allege that these statutes are unconstitutional pursuant to the decision of the Supreme Court in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986).[20] In that case, the Court held that a Pennsylvania statute

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[18] Utah Code Ann. §§ 76-7-307 and -308. These provisions are set out in full supra.

[19] In the exercise of "best medical judgment," the physician is required under the statute to "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to, (a) her physical, emotional and psychological health and safety, (b) her age, (c) her familial situation." Utah Code Ann. § 76-7-304 (Supp.1991).

[20] Plaintiffs also argue that the statutes are unconstitutional because the language permitting abortion of a viable fetus in the case of "grave damage to the woman's health" conflicts with statements in *Roe* (reiterated in *Casey*) that the State can only regulate or proscribe abortions after viability "if the law contains exceptions for pregnancies which endanger a woman's life or health." *Casey*, --- U.S. at ---, 112 S.Ct. at 2804 (emphasis added). The claim is that by the time the level of "grave damage" is reached, a woman's health would already be "endangered." However, the definition of "endanger," "to expose to danger or harm: imperil," Webster's II

was facially unconstitutional because it" 'require[d] the mother to bear an increased medical risk in order to save her viable fetus.'" *Id.* at 769, 106 S.Ct. at 2183 (citing *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). In *Colautti*, the Court did not actually rule such a trade-off to be unconstitutional, but the majority recognized "serious ethical and constitutional difficulties, that we do not address," in statutory language requiring a physician "to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400, 99 S.Ct. at 6878. Although in purporting to follow *Colautti*, *Thornburgh*, appears to decide the issue, the case was called into question in the recent *Casey* opinion, and for reasons set forth hereinafter, this Court considers *Thornburgh* to be substantially undermined and not controlling to invalidate the Utah statute.[21]

Authors of the Joint Opinion in *Casey* discarded the trimester approach set forth in *Roe v. Wade* as unnecessary because "we do not consider [it] to be part of the essential

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New Riverside University Dictionary 431 (1988), is not unlike the meaning of "grave" damage, "fraught with danger or harm." *Id.* at 546. The requirement in section 76-7-302(3) that the physician avoid "grave damage" to the woman's health is consistent with the Supreme Court's mandate that an exception be provided to permit abortion of a viable fetus if the woman's health is "endangered."

[21] Only the Supreme Court can overrule one of its own precedents. *Thurston Motor Lines, Inc. v. Jordan K. Rand Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983). However, "if later Supreme Court decisions indicate to a high degree of probability that the Court would repudiate the prior ruling if given the opportunity, a lower court need not adhere to the precedent." *Levine v. Heffernan*, 864 F.2d 457 (7th Cir. 1988) (citations omitted) (cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989)).

holding of *Roe*." *Casey*, --- U.S. at ---, 112 S.Ct. at 2818.[22] The authors of the Joint Opinion also said, "The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and it practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Id.*

As a result of the Court's decision in *Casey*, the "rigid constraint" set forth in the trimester framework is no longer the law of the land, and cases which have struck down abortion regulations on the basis applying the trimester framework can no longer be regarded as controlling.[23] This is significant because, as noted in the Joint Opinion, "[m]ost of our cases since *Roe* have involved the application of rules derived from the trimester framework." *Id.* at ---, 112 S.Ct at 2818 (citing *Thornburgh* and *Akron I*). The Court said that such cases cannot be reconciled with the holding of *Roe* itself "that the State has legitimate interests in the health of the woman and in protecting the potential life within her." *Id.*, at ---, 112 S.Ct. at 2817.

[6, 7] The practical effect of the rejection of the trimester framework is that states will now have much greater leeway to pass regulations that impinge to some degree upon

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[22] This part (Part IV) of the Joint Opinion commanded only a minority of three of the court, but the four dissenting Justices concurred in the result of abandoning the trimester framework.

[23] The authors of the Joint Opinion disapproved those parts of *Thornburgh* which are "inconsistent with *Roe's* acknowledgment of an important interest in potential life...." *Casey*, --- U.S. at ---, 112 S.Ct. at 2823.

the woman's right to non-therapeutic, pre-viability abortions.[24] In addition, these regulations will be upheld unless they constitute a "substantial obstacle" to the woman's right to choose to abort a nonviable fetus in view of the formal acceptance and delineation of the undue burden test. *Id.* at ---, 112 S.Ct. at 2820.[25] As the Third Circuit recently noted, "when a majority of the Justices announce in the course of deciding a case that they are substituting a new standard or result for that used in a prior case, the substitution is effected, and the lower courts are thereafter bound to follow the new standard or result." *Planned Parenthood v. Casey*, 947 F.2d 682, 692 (3rd Cir.1991). This Court therefore abandons strict scrutiny review as required in *Roe* in favor of the undue burden test as adopted in *Casey* relative to pre-viability, non-therapeutic abortions.

It appears to this Court that the greater importance set forth in *Casey* upon the State's interest in potential fetal life, and the corresponding deceased weight given to the woman's right to abortion, extend with even more force into the area of

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[24] The Court in *Casey* declared,

A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.
--- U.S. at ---, 112 S.Ct. at 2818.

[25] In *Thornburgh* and other post-*Roe* pre-*Webster* cases, the woman's right to an abortion was regarded as fundamental, so very few abortion regulations survived strict scrutiny. In *Casey* the Court revised the woman's right to abortion from a virtually unassailable fundamental right subject to strict scrutiny review to a liberty interest subject to undue burden analysis.

post-viability abortions where the State's interest in fetal life becomes compelling. Utah's post-viability abortion provisions square with the emphasis in *Casey* on the State's interest in viable fetal life. further, a safety valve exists in the Utah statutory scheme in that in any abortion the physician is required to "consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed."[26] The statutes in question only become operative "when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb" and require the physician to favor the survival of the fetus "consistent with the purpose of saving the life of the woman or preventing grave damage to her health."

Based upon the foregoing, this Court finds Utah Code Ann. §§ 76-7-307, 308 (Supp.1991) to be facially valid and to bear a rational relationship to the legitimate state interest in preservation of viable fetal life.

4. Spousal Notification

[8] The fourth provision of the Utah Abortion Act under consideration is section 76-7-304, the spousal notification requirement. A majority of the Supreme Court struck down a somewhat similar spousal notification requirement in *Casey*. The Pennsylvania statute at issue in that case mandated that a married woman desiring an abortion provide the physician with either a signed statement that she has notified her spouse that she intends to have an abortion, or a signed statement that her husband was not the one who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal

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[26] Utah Code Ann. § 76-7-304(1). *See* discussion at 879.

sexual assault which she has reported; or that the woman believes that notification will result in bodily injury. 18 Pa.Cons.Stat.Ann. § 3209 (1990).

The Utah statute provides that spousal notice be given by the pregnant woman's physician, rather than by herself. Also, the Utah statute requires notification to the husband "if possible." Defendants contend that the statute is facially valid because it has been on the books for 18 years without any evidence that it has prevented any abortions[27] , the physician and not the pregnant woman gives notice if such is to be given, and the statute contains a broad and expansive exception which requires notice only "if possible."

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[27] The Supreme Court in *Casey* approached the facial challenge of the Pennsylvania spousal notification statute in a way that seems to avoid the well-established requirement that the plaintiff "'show that no set of circumstances exists under which the [provision] would be valid.'" *Casey*, --- U.S. at ---, 112 S.Ct. at 2870 (citation omitted). The Court conceded that the statute might affect "fewer than one percent of women seeking abortions." *Id.* at ---, 112 S.Ct. at 2829. However, the Court went on to state:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.... [I]n a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

Id. at ---, 112 S.Ct. at 2829-30.

In this Court's opinion, the giving of notice by the woman's physician rather than by the woman constitutes a distinction without a difference. The same abuse from violent and dangerous husbands could be expected whether the notice comes from the woman or the woman's physician. As to the arguably broad "if possible" exception, the Utah Supreme Court interpreted the statute in effect to require notification not only if possible, but if at all possible.[28] *See H.L. v. Matheson*, 450 U.S. 398, 405, 101 S.Ct. 1164, 1169, 67 L.Ed.2d 388 (1981) (citing *H.L. v. Matheson*, 604 P.2d 907, 913 (Utah 1979)).

The Supreme Court analogized the Pennsylvania spousal notification requirement, despite its extensive exceptions, to the spousal consent requirement invalidated in *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976).[29] The majority of

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[28] In *H.L. v. Matheson*, 604 P.2d 907, 913 (1979) the Utah Supreme Court said:

> There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning. The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.

[29] The statute in *Danforth* required prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless "the abortion is certified by a licensed

the Supreme Court then adopted what appears to be an unequivocal position on the unconstitutionality of spousal notification statutes, stating:

> The spousal notification requirement is likely to prevent a significant number of women from obtaining an abortion.... [I]t will impose a substantial obstacle. We must not blind ourselves to the fact that a significant number of women who fear for their health and safety as well as the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases.

Casey, --- U.S. at ---, 112 S.Ct. At 2829. The same principles apply to the Utah statute.[30]

Conceivably, a spousal notification statute with appropriate exceptions could be found to be constitutional.

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physician to be necessary in order to preserve the life of the mother." *Danforth*, 428 U.S. at 67-68, 96 S.Ct. at 2840. The Court struck down this statute on the grounds that "we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." *Id.* at 70, 96 S.Ct. at 2841.

[30]In striking down the Pennsylvania spousal notification statute, the Supreme Court relied primarily on national information and statistics to "reinforce what common sense would suggest." *Casey*, --- U.S. at ----, 112 S.Ct. at 2828. This court assumes that essentially the same information, statistics and common sense would apply to Utah.

However, that situation is not presented here.[31] In line with *Casey*, this Court holds section 76-7-304 to be an unconstitutional infringement upon the woman's liberty interest.

5. Serious Medical Emergency

[9] The final provision at issue is the "serious medical emergency" statute. Utah Code Ann. § 76-7-315 (Supp.1991). When such an emergency exists, this statute excuses compliance with requirements otherwise mandated by the legislature, such as the notification requirements of subsection 76-7-304(2), and the consent requirements of subsection 76-7-305(2).[32]

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[31] If the Utah legislature had defined, or the Utah Court had construed, "if possible" expansively as the plaintiff urged in *H.L. v. Matheson*, that is, "as conferring on the consulting physician discretion to determine if medically, socially, psychologically, and physically, it would be appropriate to notify...." 604 P.2d at 912, the spousal notification statute might withstand constitutional challenge. As interpreted by the Utah Supreme Court in *Matheson*, however, the exception to notification set forth in the Utah law is less broad than in Pennsylvania.

[32] Section 76-7-305(2) provides:

(2) No consent obtained pursuant to the provisions of this section shall be considered voluntary and informed unless the attending physician has informed the woman upon whom the abortions is to be performed:

(a) Of the names and addressed of two licensed adoption agencies in the state of Utah and the Services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

(b) Of the details of development of unborn children and abortion procedures, including and foreseeable complications, risks, and the nature of the post-operative recuperation period; and

(c) Of any other factors he deems relevant to a voluntary and

a. Core Meaning

Plaintiffs have challenged this statute on grounds of unconstitutional vagueness. They claim that the term "serious medical emergency" is incapable of definition and that the absence of a mens rea provision creates potential criminal liability because of uncertainty as to whether the statute embodies an objective or a subjective standard of "serious medical emergency."

[10] The test applies to statutes challenged for vagueness is whether "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964). This test incorporates the requirements that notice be given to individuals of prohibited conduct, *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), and that sufficient guidance be given to enforcement officials to avoid "arbitrary and discriminatory enforcement." *Id.* With respect to these two concerns, the Court stated,

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish

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informed consent.

Section 76-7-315 also excuses compliance with section 76-7-302, a portion of which (§ 76-7-302(2)) this court strikes down as unconstitutional in this Memorandum Decision and Order.

> minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Id. At 357-358, 103 S.Ct. At 1858 (quoting *Smith v. Goguen*, 415 U.S. 566, 574-575, 94 S.Ct. 1242, 2148, 39 L.Ed.2d 605 (1974).

[11, 12] In context of a facial challenge[33] such as this, plaintiffs have a more difficult burden of proof. Plaintiffs must establish that the challenged law is "impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In other words, that the law is "utterly devoid of a standard of conduct so that it 'simply has no core' and cannot be validly applied to any conduct." *High Ol' Times, Inc. v. Busbee*, 673 F.2d 1225, 1228 (11th Cir.1982). If persons of reasonable intelligence can determine a core meaning, "the enactment may validly be applied to conduct within that meaning and the possibility of a valid application precludes facial invalidity." *Id.*(quoting *Brache v. County of Westchester*, 658 F.2d 47, 51 (2nd Cir.1981), cert. denied, 455 U.S. 1005, 102 S.Ct. 1643, 71 L.Ed.2d 874 (1982)).

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[33] The Supreme Court has observed that "'[a] facial challenge ... is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.'" *Rust v. Sullivan*, --- U.S. ----, ----, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

With regard to the argument that the term "serious medical emergency" has not core meaning, it is apparent to the Court that physicians routinely are confronted with emergencies and as a part of their training can recognize them. In a prior Memorandum Decision and Order in this case, this Court followed Supreme Court precedent in finding a core meaning for such terms as "necessary to save a mother's life" and "grave damage to the woman's medical health," because definition of these terms is a "routine question for the professional judgment of the attending physician." *Jane L. v. Bangerter*, 794 F.Supp. 1537, 1542 (D.Utah 1992).

b. Mens Rea

In addition to the existence of a core meaning for the terms used in the Utah statute, whatever ambiguity inheres in the term"serious medical emergency" is cured by the presence of a mens rea statute which requires scienter on the part of the physician before criminal liability attaches. The Supreme Court has stated that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Flipside, 455 U.S. at 499, 102 S.Ct. at 1193.[34]

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[34] The Court cited a law review article for the proposition that not every scienter requirement will suffice to mitigate a law's vagueness:

> [I]t is evident that ... the scienter meant must be some other kind of scienter than that traditionally known to the common law-the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial... Such scienter would clarify nothing; a

The mens rea statute applicable to the serious medical emergency statute, section 76-7-314, requires intentional[35] performance of an unauthorized[36] abortion before a personperforming an abortion could be prosecuted. The Legislature of Utah imposed this scienter requirement so that a physician would intentionally have to abort a fetus when the physician knew that a serious medical emergency did not exist.

> clarificatory "scienter" must envisage not only a knowing of what is done but a knowing that what is done is unlawful or, at least, so "wrong" that it is probably unlawful.

Flipside, 455 U.S. at 499 n. 14, 102 S.Ct. At 1193 n. 14 (quoting Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67,87 n, 98 (1960)).

[35] By definition (section 76-7-301) as well as penalty (section 76-7-314), performance of an abortion in violation of the "serious medical emergency" statute would have to be "intentional":

> 76-6-301. Definitions.
> As used in this part:
> (1) "Abortion" means the intentional termination or attempted termination of human pregnancy....
> 76-7-314. Violations of abortion laws--Classifications.
> (1)(a) Any person who intentionally performs an abortion other than authorized by this part is guilty of a felony of the third degree.... (Emphasis added).

[36] Utah Code Ann. § 76-7-314 imposes criminal liability upon any person "who intentionally performs an abortion other than authorized...." (Emphasis added). Abortions performed "when due to a serious medical emergency" are authorized under Utah Code Ann. 76-7-315.

In a similar context, the Third Circuit said:

> [T]he statute requires a physiciant to violate his or her own good faith clinical judgment in order to be criminally liable. This is a subjective, not an objective standard.... We fail to see how any physician practicing in good faith could fear conviction under the Act.

Planned Parenthood v. Casey, 947 F.2d 682, 702 (3rd Cir1991). In the instant case, the subjective good faith judgment of an attending physician who perceives a "serious medical emergency" to exist would also constitute a defense to a criminal charge under the Act.

Plaintiffs cite *Colautti v. Franklin*, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) in support of their proposition tha the mens rea provision in section 76-7-315 is inadequate. In *Colautti*, the Supreme Court held (among other things) that section 5(a) of the Pennsylvania Abortion Control Act 1974 Pa.Laws, Act No. 209, (Purdon 1977), was unconsitutionally vague and that the general mens rea requirement in section 2501, Pa.Stat.Ann., Tit. 18 (Purdon 1973 and Supp. 1978), did not cure that vagueness.

The Utah mens rea statute differs from the Pennsylvania statue in one crucial respect. The required mental state under the Pensylvania statute was "intentionally, knowingly, recklessly or negligently caus[ing] the death of another human being." § 2501 (1973). Therefore as the Supreme Court noted, "the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus ... [but it does not require] that the physician

be culpable in failing to find sufficient reason to believe that the fetus may be viable." *Colautti*, 439 U.S. at 394-395, 99 S.Ct. at 685. In contrast, the Utah Statute conditions liability upon intentional abortion of a fetus when the phusician knew that a serious medical emergency was not present. This type of mens rea requirement "relieves[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware" and perserves section 76-7-315 from a vagueness challenge. *Screws v. United States*, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945).

c. Best Medical Judgment-Well Being of Woman

In addition to the existence of a mens rea provision requiring scienter, this Court reads section76-7-304 (set out in full supra) to express the legislature's intent that the physician's "best medical judgment" must always be brought to bear upon any abortion-related decision. This section details some of the factors relevant to the well-being of the woman which the physician shall consider in the exercise of his or her best medical judgment, and does not limit the scope of these considerations to any particular circumstances. As noted in this Court's earlier memorandum decisions, the Supreme Court has upheld the constitutionality of statutes which permit the physician's best medical judgment to determine the necessity of abortion. *See* e.g., *United States v. Vuitch*, 402 U.S. 62, 69-70, 91 S.Ct. 1294, 1298, 28 L.Ed.2d 601 (1971) (statute permitting abortion when necessary in physician's judgment to perserve health of woman was not void for vagueness); *Doe v. Bolton*, 410 U.S. 179, 191-192, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973) (statute requiring determination of necessity of abortion based upon attending physicians best clinical jusgment not void for vagueness).

As against a similar challenge to a "medical emergency" law, the District Court in *Casey* invalidated the statute finding that there were three serious conditions which would not be covered thereunder: preeclampsia, inevitable abortion, and prematurely ruptured membrane. *Planned Parenthood v. Casey*, 744 F.Supp. 1323, 1378 (E.D.Pa.1990). The Third Circuit reversed, and in rejecting the vagueness claim stated:

> [W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury.

Planned Parenthood v. Casey, 947 F.2d 682, 701 (3rd Cir.1991). The Supreme Court affirmed the Court of Appeals and declared that its interpretation did not amount to "plain error," *Casey*, --- U.S. at ---, 112 S.Ct. At 2822 (citing *Palmer v. Hoffman*, 318 U.S. 109, 118, 63 S.Ct. 477, 482, 87 L.Ed. 645 (1943), *Brackett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500, 105 S.Ct, 2794, 2799-2800, 86 L.Ed.2d 394 (1985) and *Frisby v. Schultz*, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988)). A majority of the Court joined in the

conclusion that the medical emergency definition "imposes no undue burden on a woman's abortion right." *Id.* This Court reads the Utah medical emergency exception as intended by the Utah legislature to assure that compliance with its abortion regulation would not in any way pose a significant threat to the life or health of a woman, and interprets the phrase "serious medical emergency" to include the serious conditions which are not expressly covered by the statute. Further, since the professional clinical judgment of the physician necessarily is implicated in his or her intentional determination of the existence or non-existence of a "serious medical emergency," the absence of a specific provision embracing the physician's professional judgment is of little import. This Court holds that the Utah medical emergency statute provides the fair warning to physicians required by the Due Process Clause, sets clear guidelines for enforcement officials, and is therefore not void for vagueness.

Based upon the foregoing, it is hereby

ORDERED, that the Utah Code Ann.§ 76-7-302(2) and Utah Code Ann. § 76-7-304 are declared to be unconstitutional under the United States Constitution. It is,

FURTHER ORDERED, that Utah Code Ann. §§ 76-67-302(3), 76-7-307, 76-7-308 and 76-7-315 are upheld as constitutional under the Constitution of the United States.

Counsel for defendants are directed to prepare and lodge with the Court a form of Judgment consistent with this opinion after first complying with local rule 206(b).

Supreme Court, U.S.
FILED
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No. 96-1481

In The

Supreme Court of the United States

October Term, 1996

MICHAEL O. LEAVITT, as Governor of the State of Utah, and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

vs.

JANE L, JANE F., and JULIE S., on behalf of themselves and all others similarly situated, et al,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF NEBRASKA ALABAMA, CALIFORNIA, MISSISSIPPI, SOUTH CAROLINA AND SOUTH DAKOTA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Following this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), more than two-thirds of the States enacted statutes attempting to protect fetal life by restricting the reasons for which abortions may be performed late in pregnancy.[1] Although *Roe* expressly recognized the States' authority to enact such statutes, 410 U.S. at 164-65, the ability of the States to enforce these statutes remains uncertain because the Court has not yet considered their constitutionality in any case. Utah's petition presents this Court with an opportunity to address this issue and to determine whether the States' authority to restrict nontherapeutic, late-term abortions is real or illusory.

To ensure that no elective abortions are performed on viable unborn children, Utah has adopted a "bright-line" rule forbidding nontherapeutic abortions after the twentieth week of gestation, as measured from the date of conception, Utah Code Ann. § 76-7-302(3) (1995), which, as the district court found, *Jane L. v. Bangerter*, 809 F.Supp. 865, 869, 873 (D. Utah 1992), is currently the earliest stage in pregnancy at which viability is possible. The Tenth Circuit Court of Appeals held that Utah may not adopt such a rule because of the possibility – which the record suggests is entirely hypothetical – that a small number of women in Utah may seek nontherapeutic abortions of nonviable fetuses after twenty weeks gestation. *Jane L. v. Bangerter*, 102 F.3d 1112, 1117 (10th Cir. 1996). According to the court of appeals, a restriction on the reasons a

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[1] The statutes are set forth in the Appendix to this Brief.

woman may seek an abortion of a nonviable fetus, even one which takes effect no earlier in pregnancy than the point at which some fetuses may survive, cannot be reconciled with this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which forbids the State from imposing an "undue burden" on the performance of a pre-viability abortion. *Jane L. v. Bangerter*, 102 F.3d at 1117.

Amici submit that the Tenth Circuit's judgment is wrong and should be reversed. The adoption of a "bright-line" rule, which forbids nontherapeutic abortions from being performed at the earliest stage of pregnancy at which viability is possible, is the only effective means of making sure that no viable unborn children are aborted for elective reasons. Moreover, restricting nontherapeutic abortions to the first twenty weeks of pregnancy (before viability is currently possible) can in no real sense be regarded as the imposition of an "undue burden" under *Casey*.

To protect fetal life, the States need to know whether they may restrict nontherapeutic, late-term abortions, and whether such restrictions may be implemented by a "bright-line" rule that is both reasonable and consistent with the known facts of fetal survival. "State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." *Casey*, 505 U.S. at 845. *Amici* respectfully request this Court to provide that needed guidance by granting Utah's petition for *certiorari*.

SUMMARY OF ARGUMENT

The issue presented by Utah's petition is whether a State, in seeking to vindicate its interest in protecting fetal life, may adopt a "bright-line" rule for determining viability where the rule is reasonable, consistent with contemporary medical knowledge as to when viability is possible, and not unduly burdensome of a woman's right to obtain an abortion.[2] Utah Code Ann. § 76-7-302(3) (1995) forbids nontherapeutic abortions after the twentieth week of gestation, as measured from the date of conception.[3]

The Tenth Circuit Court of Appeals held that § 76-7-302(3) is unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992),

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[2] In addition to Utah, four other States have adopted "bright-line" rules forbidding nontherapeutic abortions: Massachusetts (during or after the 24th week of gestation); Nevada (after the 24th week); North Carolina (after the 20th week); and Pennsylvania (during or after the 24th week). Two other States have established presumptions of viability at particular stages of gestation: Missouri (requiring fetal viability testing at 20 weeks' gestation); Oklahoma (creating a rebuttable presumption of viability after the 24th week of gestation). The statutes are set forth in the Appendix.

[3] "The duration of pregnancy can be measured from the last menstrual period (LMP) or from conception. Calculation of conception age begins 2 weeks later than LMP." *Jane L. v. Bangerter*, 809 F.Supp.at 869. Utah calculates gestational age "measured from the date of conception. . . . " Utah Code Ann. § 76-7-302(3). Thus, under the statute, "[t]he statutory cutoff for non-therapeutic abortions is *after* 20 weeks, which is 21 weeks from the date of conception or 23 weeks LMP." 809 F.Supp. at 869 (emphasis in original).

because both its purpose and effect was to place a substantial obstacle in the path of a woman seeking an abortion of a *pre*-viable, *post*-20 week unborn child. *Jane L. v. Bangerter*, 102 F.3d at 1116-18. Without disputing the district court's finding that at twenty-one weeks' gestation (measured from the date of conception), *some* fetuses *are* viable, 809 F.Supp. at 869, 873, the court of appeals held that § 76-7-302(3) is invalid because it prevents the abortion of *other* fetuses who are *not* viable at that stage of pregnancy. 102 F.3d at 1116-18. Relying principally on this Court's decisions in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979), the court of appeals concluded that "viability is a matter to be determined by an attending physician, and that until viability is actually present the State may not prevent a woman from choosing to abort." 102 F.3d at 1118.

Amici submit that the court of appeals has misread this Court's precedents. Although there is language in both *Danforth* and *Colautti* indicating that the determination of viability must be left to the judgment of the attending physician, neither case concerned a statute, like Utah's, that created a "bright-line" rule for determining viability. Moreover, given the difficulty in accurately assessing the exact stage of pregnancy at which a particular fetus becomes viable, the use of a "bright-line" rule is clearly reasonable. "Nothing in *Roe*, or any of its progeny, holds that a State may not effectuate its compelling interest in the potential life of a viable fetus by seeking to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age." *Webster v. Reproductive Health Services*, 492

U.S. 490, 544 (1989) (Blackmun, J., concurring in part and dissenting in part).

The Tenth Circuit's conclusion that § 76-7-302(3) imposes an "undue burden" upon a woman seeking an abortion of a nonviable fetus in violation of *Casey* does not withstand scrutiny. First, as the district court found, 809 F.Supp. at 869-70, no woman in Utah has ever sought a nontherapeutic abortion of a nonviable fetus after the twentieth week of gestation, and no physician licensed to practice medicine in Utah has ever performed or has ever sought to perform a post-20 week abortion for reasons not allowed by § 76-7-302(3).[4] A statute that restricts conduct no one seeks to engage in cannot be regarded as imposing an "undue burden," even in a theoretical manner. Second, even assuming that a few women would seek to abort their nonviable fetuses after the twentieth week of gestation for nontherapeutic reasons, limiting such abortions to the first twenty weeks of pregnancy can in no practical sense be regarded as the imposition of an "undue burden." Finally, even if the State may not adopt a "bright-line" rule for viability, the Court should grant Utah's petition because, in mute defiance of this Court's remand order, *see Leavitt v. Jane L.*, 116 S.Ct. 2068 (1996), the court of appeals refused to decide whether § 76-7-302(3) has any constitutional *post*-viability applications as required by the express provisions of the Utah severability statute. *See* Utah Code Ann. § 76-7-317.

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[4] For the reasons set forth in Utah's petition, the Tenth Circuit's attempt to question this finding, 102 F.3d at 1117-18, is based on a misreading of the record.

ARGUMENT

THE COURT SHOULD REVIEW THE TENTH CIRCUIT'S JUDGMENT BECAUSE THE COURT OF APPEALS ERRED IN HOLDING THAT A STATE MAY NOT ADOPT A "BRIGHT-LINE" RULE FOR DETERMINING VIABILITY WHERE THE RULE IN QUESTION IS REASONABLE AND CONSISTENT WITH THE KNOWN FACTS OF FETAL VIABILITY, AND DOES NOT UNDULY BURDEN A WOMAN'S RIGHT TO OBTAIN AN ABORTION BEFORE VIABILITY.

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. The Court reaffirmed this holding in *Planned Parenthood v. Casey*, 505 U.S. at 879. The Court confirmed "the State's power to restrict abortions after fetal viability if the law contains exceptions for pregnancies which endanger the woman's life or health." *Id.* at 846.

The Utah statute struck down by the Tenth Circuit allows late-term abortions to be performed if the physician determines that the abortion is necessary "to save the . . . woman's life," "to prevent grave damage to [her] medical health," or "to prevent the birth of a child that would be born with grave defects." Utah Code Ann. § 76-7-302(3) (1995) (incorporating by reference Utah Code Ann. § 76-7-302(2)(a), -(d), and -(e)). The statute authorizes abortions to be performed in those "rare circumstances in which the pregnancy is itself a danger to [the woman's] own life or health," *Casey*, 505 U.S. at 851,

and thus satisfies the language of *Roe*, reaffirmed in *Casey*, that the law contain "exceptions for pregnancies which endanger the woman's life or health." *Casey*, 505 U.S. at 846. Although "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nonthereapeutic abortions," 505 U.S. at 860, viability may occur as early as the twenty-third week of pregnancy. *Id.* The district court found, and the court of appeals did not dispute, that "[s]urvival as early as 21 weeks gestational age (23 weeks LMP) is possible," 809 F.Supp. at 869, which is the "statutory cutoff for non-therapeutic abortions" under the Utah statute. *Id.*

The Tenth Circuit, however, held that Utah could not adopt a "bright-line" rule for determining viability, even one which is reasonable and consistent with contemporary medical knowledge of when viability is possible, "because by mandating a definition of viability that may not be correct in a given case, it impacts the choice of a woman whose fetus remains nonviable after twenty weeks from conception." *Jane L. v. Bangerter*, 102 F.3d at 1115. The court of appeals failed to explain how a woman who may be considering an elective abortion is burdened by having to act on her decision during the first twenty weeks of her pregnancy.

In support of its holding, the court of appeals relied on this Court's decisions in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979). *Jane L. v. Bangerter*, 102 F.3d at 1115. In *Danforth*, the Court upheld Missouri's definition of viability, over the plaintiffs' argument that the definition conflicted with *Roe* because it did not "contain any reference to a

gestational time period." *Danforth*, 428 U.S. at 63. In response, the Court stated:

> [I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64. The Court thus rejected the contention that "a specified number of weeks in pregnancy must be fixed by statute as the point of viability." *Id.* at 65.

In *Colautti*, the Court struck down as unconstitutionally vague a viability-determination requirement in Pennsylvania law. 439 U.S. at 390-97. Prior to discussing that requirement, the Court reviewed its earlier decisions in *Roe, Doe v. Bolton*, 410 U.S. 179 (1973), and *Danforth*. Summarizing its holdings in these three cases, the Court stated:

> [T]his Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment

> of viability – be it weeks of gestation or fetal weight or any other single factor – as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. And we have recognized no attempt to stretch the point of viabilty one way or the other.

Id. at 388-89.

Significantly, neither *Danforth* nor *Colautti* involved a legislative attempt to define viability in terms of gestational age alone. Unlike the narrow *holding* in *Danforth*, that the States *need not* incorporate a "gestational time period" into the definition of viability, the broad statements in both *Danforth* and *Colautti* that the States *may not* select a single factor as the determinant of when viability occurs are nonbinding *dicta*.[5]

Moreover, both opinions were replete with record references attesting to the difficulty of determining viability in a particular case. *See Danforth*, 428 U.S. at 64 n.3,

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[5] It is worth noting that, in *Danforth*, the Court cited with approval a three-judge district court decision striking down a Minnesota statute which provided that a fetus "shall be considered potentially 'viable' " during the second half of its gestation period. 428 U.S. at 65 & n.5 (*citing Hodgson v. Anderson*, 378 F.Supp. 1008, 1016 (D. Minn. 1974), *dismissed for want of jurisdiction sub nom. Spannaus v. Hodgson*, 420 U.S. 903 (1975), *aff'd sub nom. Hodgson v. Lawson*, 542 F.2d 1350 (8th Cir. 1976)). The three-judge court struck down the statute because the defendants in that case had presented no evidence of fetal viability at twenty weeks. 378 F.Supp. at 1016. This case is different because it is undisputed that some fetuses may be viable at twenty-one weeks gestation (twenty-three weeks LMP).

65 n.4; *Coluatti*, 439 U.S. at 395-96 & nn.14, 15. That difficulty strongly suggests the need for adoption of a "bright-line" rule, so long as the rule is reasonable, *i.e.*, that the rule does not establish a line that restricts abortions before viability is possible, and is one which is consistent with the known facts of fetal survival. Less than five years after *Colautti* was decided, at least one Justice expressed concern, albeit in a different context, that "[t]he State may no longer rely on a 'bright line' that separates permissible from impermissible regulation." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 455 (1983) (O'Connor, J., dissenting).

The need to provide the States with more flexibility in promoting their interest in fetal life was finally recognized in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), where the Court upheld Missouri's requirement of fetal viability testing at twenty weeks gestation, as measured from the first day of the woman's last menstrual period. Contrary to the Tenth Circuit's peculiar reading, the Court in *Webster* did *not* "reiterate its holdings in *Danforth* and *Colautti* that the determination of viability is a matter for the judgment of the attending physician, and that therefore the legislature could not give one element, such as gestational age, dispositive weight." 102 F.3d at 1115. Rather, a majority of the Court upheld the viability testing requirement (which established a rebuttable presumption of viability at twenty weeks gestational age), and a plurality of the Court voted to sustain the testing requirement notwithstanding its view that the requirement was incompatible with *Danforth, Colautti* and *Roe*. *Webster*, 492 U.S. at 513-20.

Justice O'Connor did not join that portion of the plurality opinion in *Webster* upholding Missouri's fetal viability testing requirement. In explaining why she did not believe that it was necessary to reconsider *Roe* in order to sustain the testing requirement, Justice O'Connor noted that "[n]o decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." *Webster*, 492 U.S. at 528 (O'Connor, J., concurring in part and concurring in the judgment). Commenting on the Court's decision in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), which involved a challenge to a Pennsylvania statute requiring a second physician to be present during an abortion performed "when viability is possible," *Thornburgh*, 476 U.S. at 769-770, Justice O'Connor stated:

> The *Thornburgh* majority struck down the Pennsylvania statute merely because the statute had no exception for emergency situations and not because it found a constitutional difference between the State's promotion of its interest in potential life when viability is possible and when viability is certain. [*Thornburgh*], 476 U.S. at 770-771. . . . [T]here is no hint in the opinion of the *Thornburgh* Court that the State's interest in potential life differs depending on whether it seeks to further that interest postviability or when viability is possible. Thus, all nine Members of the *Thornburgh* Court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible.

Webster, 492 U.S. at 528 (O'Connor, J., concurring in part and concurring in the judgment). Justice Blackmun, who would have struck down the testing requirement on other grounds, acknowledged that the State has the right "to ensure that no viable fetus is mistakenly aborted because of the inherent lack of precision in estimates of gestational age." 492 U.S. at 544 (Blackmun, J., concurring in part and dissenting in part).[6] That is precisely what Utah has done in enacting § 76-7-302(3).

The need for States to be able to rely upon a "bright-line" rule for determining viability is evident from an examination of this Court's opinion in *Colautti*, 439 U.S. 379 (1979). Referring to the "uncertainty of the viability determination itself," *id.* at 395, the Court noted,

> . . . a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman's general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus' obtaining meaningful life

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[6] The district court in *Webster* found that "the medical evidence is uncontradicted that a 20-week fetus is *not* viable," and that "23 1/2 to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists." 662 F.Supp. 407, 420 (W.D. Mo. 1987) (emphasis in original). The district court also found that there may be up to a four-week error in estimating gestational age, *id.* at 421, which, as the Court said, "supports testing at 20 weeks." 492 U.S. at 516.

> outside the womb can be determined only with difficulty. Moreover, . . . even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numeral probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.

Id. at 395-96.

Colautti is an eloquent statement of why adoption of a "bright-line" rule for determining viability is necessary to safeguard the State's interest in protecting fetal life. The only way to ensure that *no* viable unborn children are aborted for nontherapeutic reasons is to forbid elective abortions at the earliest stage of pregnancy at which viability is possible. Otherwise, it is inevitable that some viable unborn children will be aborted because of an erroneous determination that they were not viable. While the imposition of a "bright-line" rule might have the effect of preventing a very limited number of women from obtaining an abortion of a nonviable fetus after the twentieth week of pregnancy for nontherapeutic reasons (although this record does not support that hypothesis), that cannot in any meaningful sense be regarded as creating an "undue burden" upon the woman's right to an elective abortion when she has had twenty weeks to decide whether to have an abortion. As this Court observed in *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), in upholding Missouri's "clear and convincing" standard of proof to govern proceedings to withdraw life-sustaining medical treatment from an

incompetent patient, "the Constitution does not require general rules to work faultlessly; no general rule can." *Cruzan*, 497 U.S. at 284.

Amici submit that there is no conflict between the adoption of a "bright-line" rule for determining viability and this Court's opinion in *Casey*. Although the Court in *Casey* stated that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions," and that "the attainment of viability may continue to serve as the critical fact," 505 U.S. at 860, the Court also noted that viability may occur as early as 23 to 24 weeks' gestation (measured from the first day of the woman's last menstrual period), *id.*, which is the equivalent of the period Utah has selected for its rule.

In enacting § 76-7-302(3), Utah has not sought to deprive women of "all choice in the matter," *Casey*, 505 U.S. at 850, or to "prohibit any woman from making the ultimate decision to terminate her pregnancy before viability," *id.* at 879. A woman may have an abortion for any reason – therapeutic or elective – before viability is possible. But after viability is possible, she may have one for therapeutic reasons only. There is, as the Court observed in *Casey*, 505 U.S. at 870, "an element of fairness" in this: "In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*

Even assuming, however, that the States may not adopt a "bright-line" rule for determining viability, this Court should grant Utah's petition for *certiorari* because

the Tenth Circuit, once again disregarding the severability langauge in § 76-7-317, refused to consider whether § 76-7-302(3) has any constitutional applications, even after viability. In remanding this case to the court of appeals, this Court ordered the Tenth Circuit to consider the constitutionality of § 76-7-302(3) apart from the constitutionality of § 76-7-302(2), which had been struck down by the district court on the authority of *Casey*. *See Jane L. v. Bangerter*, 809 F.Supp. at 870-71. The court of appeals held that § 76-7-302(2) is unconstitutional because it restricts the reasons for which *pre*-viability abortions may be performed, but the court did not rule on the constitutionality of § 76-7-302(2), insofar as it applies to *post*-viability abortions. 102 F.3d at 1118 n.7. That was error.

Section 76-7-317 mandates severance of unconstitutional *applications*, as well as unconstitutional *language*. By ignoring the statutory mandate of § 76-7-317, and not giving effect to the constitutional applications of § 76-7-302(3), the court of appeals has engaged in "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 116 S.Ct. at 2072. This Court has repeatedly held that " 'a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.' " *Dalton v. Little Rock Family Planning Services*, 116 S.Ct. 1063, 1064 (1996) *(quoting Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985)). *See also Ada v. Guam Society of Obstetricians & Gynecologists*, 113 S.Ct. 633 (1992) (Scalia, J., dissenting from denial of *certiorari*) (a federal court should sever unconstitutional language or enjoin only the unconstitutional applications). The court of appeals, in mute defiance of this Court's remand order,

has once again overstepped its judicial function by ignoring Utah's severability statute and not giving effect to the constitutional applications of the law. Entirely apart from the merits presented by Utah's petition, that warrants Supreme Court review.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Honorable Court to grant the petition for certiorari.

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APPENDIX

State Statutes Restricting Late-Term Abortions[1]

Ariz. Rev. Stat § 36-2301.01(A) (West 1993)

Ark. Code Ann. § 20-16-705(a) (Michie 1991)

Conn. Gen. Stat. Ann. § 19a-602(b) (West 1996 Supp.)

Fla. Stat. Ann. § 390.001(2) (West 1993)

Ga. Code Ann. § 16-12-141(c) (1996)

Idaho Code § 18-608(3) (1987) (life only)

720 Ill. Comp. Stat. Ann. 510/5 (West 1993)

Ind. Stat. Ann. § 16-34-2-1(3) (Michie 1993) (allows post-viability abortions only when necessary to prevent "a substantial permanent impairment of the life or physical health of the pregnant woman")

Iowa Code Ann. § 707.7 (West 1993)

Kan. Stat. Ann. § 65-6703 (1996 Supp.) (allows post-viability abortions only to save the life of the pregnant woman or to prevent the birth a child with severe fetal anomaly)

Ky. Rev. Stat. Ann. § 311.780 (Michie 1995)

La. Rev. Stat. Ann. § 40.1299.35.4(A) (West 1992)

Me. Rev. Stat. tit. 22, § 1598(4) (West 1992 & 1996 Supp.)

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[1] Except as otherwise noted, the statutes set forth in this Appendix allow post-viability (or third trimester) abortions only to preserve the life or health of the pregnant woman.

Md. Code Ann., Health-Gen. II, § 20-209(b)(2)(i) (1996)

Mass. Gen. Laws Ann. ch. 112, § 12M (West 1996) (allows abortion during or after the twenty-fourth week of pregnancy when necessary "to save the life of the mother or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health")[2]

Minn. Stat. Ann. § 145.412, subd. 3 (West 1989)

Mo. Ann. Stat. § 188.030(1) (West 1996)[3]

Mont. Code Ann. § 50-20-109(1)(c) (1995)

Neb. Rev. Stat. § 28-329 (1995)

Nev. Rev. Stat. § 442.250(1)(c) (Michie 1996) (allows abortion after the twenty-fourth week of gestation if necessary "to preserve the life or health of the pregnant woman")[4]

N.C. Gen. Stat. § 14-45.1(b) (1993) (allows abortion after the twentieth week of pregnancy if there is a "substantial risk that continuance of the pregnancy would

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[2] The Massachusetts statute does not state how the length of pregnancy is to be determined.

[3] Missouri requires fetal viability testing at twenty weeks gestation, as measured from the first day of the woman's last menstrual period. *See* Mo. Ann. Stat. §§ 188.015(4), 188.029 (West 1996).

[4] A reporting statute, Nev. Rev. Stat. Ann. § 442.260(2)(j), indicates that gestational age is to be measured from the first day of the woman's last menstrual period.

threaten the life or gravely impair the health of the woman")[5]

N.D. Cen. Code § 14-02.1-04(3) (1991) (allows post-viability abortions only if necessary "to preserve the life of the woman" or if "continuation of [the] pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health")

Ohio Rev. Code Ann. § 2919.17 (Anderson 1996) (allows post-viability abortions to prevent the death of the pregnant woman or where there is "serious risk of substantial and irremediable impairment of a major bodily function")

Okla. Stat. Ann. tit. 63, § 1-732 (West 1997)[6]

18 Pa. Cons. Stat. Ann. §§ 3211(a), 3211(b) (West 1996 Supp.) (allows abortion during or after the twenty-fourth week of pregnancy if necessary "to prevent either the death of the pregnant woman or the substantial and irreversible impairment of a major bodily function of the woman")[7]

R.I. Gen. Laws § 11-23-5 (1994) (life only)

S.C. Code Ann. § 44-41-20(c) (Law. Co-op. 1985)

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[5] The North Carolina statute does not indicate how the length of pregnancy is to be measured.

[6] The Oklahoma statute includes a rebuttable presumption of viability after the twenty-fourth week of gestation, as measured from the first day of the woman's last menstrual period.

[7] The Pennsylvania statute measures gestational age from the first day of the woman's last menstrual period. See 18 Pa. Cons. Stat. Ann. § 3203 (West 1996 Supp.).

S.D. Codified Laws § 34-23A-5 (Michie 1994)

Tenn. Code Ann. § 39-15-201(c)(3) (1991)

Tex. Rev. Civ. Stat. Ann. art. 4495b, § 4.011 (West 1997 Supp.) (allows post-viability abortions to prevent the death of the pregnant woman or substantial risk of severe impairment to her physical or mental health)

Utah Code Ann. § 76-7-302(3) (1995) (allows abortion after the twentieth week of gestation, as measured from the date of conception, to save the life of the pregnant woman, to prevent grave damage to her medical health, or to prevent the birth of a child with grave defects)

Va. Code §§ 18.2-71, 18.2-74(b) (West 1996) (allows post-viability abortions only if "continuation of the pregnancy is likely to result in the death of the woman or substantially and irremediably impair [her] mental or physical health")

Wash. Rev. Code Ann. §§ 9.02.110, 9.02.120 (West 1997 Supp.)

Wis. Stat. Ann. § 940.15 (1996)

Wyo. Stat. § 35-6-102 (Michie 1994) (allows post-viability abortions where there is an "imminent peril that substantially endangers [the] life or health" of the pregnant woman)

Supreme Court, U.S.
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MAY 12 1997
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No. 96-1481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL O. LEAVITT, as Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State of Utah,

Petitioners,

—v.—

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Utah's statute banning abortion after 20 weeks violates the purpose or effect prongs of the undue burden test established by this Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)?

2. Whether defining viability of the fetus as occurring at 20 weeks gestation is unconstitutional because it prevents physicians from determining viability on an individual, case-by-case basis?

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Respondents Jane L., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by the Governor and the Attorney General of Utah (hereinafter "petitioners" or "the State"), docketed on March 18, 1997.

COUNTERSTATEMENT OF THE CASE

In 1991, Utah enacted a criminal ban on nearly all abortions, codified as Utah Code Ann. § 76-7-302 ("the ban"). *See* Pet. 2-3.[1] The ban permits abortions only in four narrow circumstances: (1) where an abortion is necessary to save the woman's life; (2) where the pregnancy is the result of rape, rape of a child, or incest as defined by Utah Code Ann. §§ 76-5-402, 76-5-402.1, 76-5-402(10) or 76-7-102, that was reported to a law enforcement agency prior to the abortion; (3) where an abortion is necessary to prevent "grave damage" to the woman's "medical health"; and (4) where the abortion is necessary to prevent the birth of a child that would be born with "grave defects." Utah Code Ann. § 76-7-302(2). After 20 weeks gestation, the ban no longer permits abortions in cases of rape and incest. Utah Code Ann. § 76-7-302(3).

In enacting a new § 302 and repealing the former section, the legislature deliberately obliterated the distinction in prior Utah law between the legality of post- and pre-viability abortions in order to test the limits of *Roe v. Wade*, 410 U.S. 113 (1973). Former § 302(3), passed in

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[1]Citations to the Petition for Certiorari are in the form "Pet. __"; citations to the appendices to the petition are in the form "A-__" (court of appeals opinion), and "B-__" (district court opinion). In addition, citations to portions of the record not contained in the appendix to the Petition are given as citations to the appellants' appendix in the court of appeals ("Aplt. App."), or as citations to the appellees' supplemental appendix in the court of appeals ("Aplees. Supp. App.").

1973 and re-enacted in 1974, had attempted to follow *Roe* by prohibiting post-viability abortions except when necessary to "save the life of the pregnant woman or to prevent serious and permanent damage to her health."[2] Section 302, on the other hand, criminalized nearly all abortions, both before and after viability. Although the 1991 ban phased out an exception for women pregnant as a result of rape or incest after 20 weeks gestation, Utah Code Ann. § 76-7-302(3), this dividing line was not intended as a viability cut-off. As the district court held, women seek abortions after 20 weeks for both viable and non-viable fetuses. *See* B-20.[3]

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[2]Former section 302 provided:

> An abortion may be performed in this state only under the following circumstances:
>
> (1) If performed by a physician; and
>
> (2) If performed ninety days or more after the commencement of the pregnancy, it is performed in a hospital; and
>
> (3) If performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the abortion is necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her health.

[3]Every time the Utah legislature sought to regulate post-viability abortions from 1973 onward, it used the medical and legal definition of viability set forth in *Roe* and subsequent cases, viz., the phrase "sufficiently developed to have any reasonable possibility of survival outside of the mother's womb." *See, e.g.*, Utah Code Ann. §§ 76-7-307, 308, former § 302. The failure to use this definition, or any other similar phrase denoting viability, in the ban, taken together with the (continued...)

Instead of allowing abortions without restriction before viability, as required by *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992), and instead of permitting abortions to protect the woman's life and health after viability, as required by *Roe v. Wade*, 410 U.S. 113 (1973), the ban requires that a physician find "grave damage" to the woman's health for all abortions, whether before or after viability. Utah Code Ann. § 76-7-302(2)(d).[4]

The district court invalidated the pre-20-week ban on abortions, *see* B-12, and the State did not appeal that ruling. However, the district court severed the post-20-week ban and upheld its constitutionality, holding that, although it would apply to abortions of *both* "non-viable [and] viable" fetuses, the prohibition "of such late, non-

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[3](...continued)
context in which the ban was passed, demonstrates that the legislature did not intend to define 20 weeks as viability. Rather, the 20-week limit reflected a disapproval of some women, particularly rape and incest victims, who would seek late abortions. The district court itself appears to have adopted this view. *See* B-20 ("Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.").

[4]The 1991 Utah statute failed in another respect to give clear preference to the woman's health over the state's interest in the fetus after viability. Like the post-20-week ban, the 1991 amendments to Utah's choice-of-method statute required that the method favor survival of the fetus unless necessary to avert "grave damage" to the woman's health. Utah Code Ann. §§ 76-7-307 & -308. These provisions were invalidated by the court of appeals, *see Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996), and are no longer at issue in this case.

therapeutic abortions does not impose an undue burden on a woman's liberty interest." B-20.[5]

The court of appeals reversed, finding the ban nonseverable. *Jane L. v. Bangerter*, 61 F.3d 1493, 1499 (10th Cir. 1995). In *Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996), this Court reversed the decision of the court of appeals, holding that the ban was severable, and remanded the case to the court of appeals for further proceedings.

On remand, the court of appeals held that the post-20-week ban is unconstitutional because it "has both the purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus." A-12. The court of appeals did not formally reach plaintiffs' claim that the post-20-week ban is unconstitutional because, as to post-viability abortions, it does not provide an adequate exception for abortions necessary to protect a woman's health. *See* A-13 at n.7. Nevertheless, the court of appeals observed that it had "addressed identical language" in its prior opinion invalidating Utah's choice-of-method statutes (Utah Code Ann. § 76-7-307 & -308). *Id.*

REASONS FOR DENYING THE WRIT

The State has failed to establish any of the factors that weigh in favor of a grant of certiorari. Indeed, the State is unable to point to the decision of any United States court of appeals or state court of last resort that purportedly conflicts with the decision of the court below. Instead, the

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[5]The district court found that the 20-week cut-off meant that the ban applied only for abortions in or after the 21st week gestation or in or after the 23rd week as measured from the last menstrual period (lmp) because the statute used the words "[a]fter 20 weeks." *See* B-9.

State argues that the decision of the court of appeals is at odds with this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). However, far from being at odds with *Casey*, the decision reached by the court of appeals is required by *Casey* and previous precedents of this Court.

In addition, the State attacks the holding of the court of appeals that the district court committed clear error in finding, as a matter of fact, that "the record contains no evidence that any woman wants or has attempted to obtain" a nontherapeutic abortion after 20 weeks. A-12. The holding of the court of appeals of clear error is, however, fully supported by the record.[6]

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISIONS IN HOLDING THAT UTAH'S POST-20-WEEK BAN IS UNCONSTITUTIONAL.

The court of appeals correctly applied *Casey*'s undue burden test in holding that the post-20-week ban has the purpose and effect of imposing a substantial obstacle in the path of women seeking previability abortions. *See Casey*, 505 U.S. at 879 ("Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."). Faced with this straightforward application of *Casey*, the State seeks to rescue Utah's post-20-week ban by casting it as a post-

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[6]Even assuming, *arguendo*, that the court of appeals improperly corrected a factual error by the district court, such an improper correction, standing alone, is not a compelling basis for this Court to grant review. *See* Point II *infra*.

viability ban and arguing that, after *Casey*, "the legislature may constitutionally fix a point after which women can no longer obtain abortions, with exceptions for pregnancies that endanger a woman's life or health." Pet. 8.

The State's effort fails for three reasons. First, the post-20-week ban has the purpose and effect of prohibiting previability abortions and is therefore unconstitutional under *Casey*. Second, *Roe*, as reaffirmed by *Casey*, requires that viability be determined on a case-by-case basis, and prohibits states from creating an irrebuttable presumption of viability. Third, even as to the post-viability abortions it restricts, the ban does not contain a constitutionally adequate health exception.

A. The Ban Imposes An Undue Burden On Pre-Viability Abortions.

The court of appeals held that the ban violates both the purpose and effect prongs of *Casey*'s undue burden test.

1. Purpose

Illegitimate purpose alone will invalidate a law under *Casey*. *Id.*, 505 U.S. at 877; *see also Armstrong v. Mazurek*, 94 F.3d 566 (9th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3507 (U.S. Jan. 13, 1997) (No. 96-1104); *A Woman's Choice v. Newman*, 904 F. Supp. 1434, 1462 (S.D. Ind. 1995) ("a state's desire to reduce the rate of abortions by making them more difficult to obtain is not [a legitimate and constitutional purpose]"), *appeal stayed*, No. 95-3965 (7th Cir. Jan. 22, 1996); *Benten v. Kessler*, No. CV-92-3161 (CPS), 1992 U.S. Dist. LEXIS 14747, at *13 (E.D.N.Y. Sept. 30, 1992) (order denying motion to intervene) ("*Casey* reinforces *Danforth* by drawing a clear line between those regulations that provide information and

those that actually effect substantive regulation on a woman's right to choose to terminate her pregnancy with the sole purpose of impeding abortion.").

Casey requires that a court first inquire carefully into the purpose of a law regulating abortion. *Casey* deliberately adopted a purpose analysis for two reasons. First, examination of purpose protects women from statutes subjected to lesser scrutiny under the undue burden standard than under the strict scrutiny of *Roe*; to offset the greater latitude given to the States to restrict abortion, the Court in *Casey* required States to act based on genuine health purpose. Second, an examination of purpose prevents the enactment of statutes to coerce and harass women without justification. Where, as here, the State's purpose to hamper access to abortion is clear, *Casey*'s concerns have special force.

Though a state may prohibit post-viability abortions when there is no danger to a woman's life or health, the purpose of prohibiting as many pre-viability abortions as possible is *not* permissible. Any previability restrictions must be "calculated to inform the woman's free choice, not hinder it." *Casey*, 505 U.S. at 877. Unlike the persuasive informational requirements upheld in *Casey*, Utah's post-20-week ban is purely coercive; its only plausible purpose is to "hinder" some women from obtaining pre-viability abortions. Therefore, the court of appeals properly held that it fails the purpose prong of *Casey*'s undue burden test.

In its first opinion, the court of appeals found that the purpose of the law was to "provide a vehicle by which to

challenge *Roe v. Wade*." A-10 (citing 61 F.3d at 1495).[7] In the opinion of which the State seeks review by this Court, the court of appeals further wrote:

> In our view, the State's determination to define viability in a manner specifically and repeatedly condemned by the [Supreme] Court evinces an intent to prevent a woman from exercising her right to choose an abortion after twenty weeks in those instances in which the fetus is not viable. This intent is confirmed by the State's brief on appeal, in which the State in essence concedes that the section was intended to prevent the nontherapeutic abortion of nonviable fetuses after twenty weeks because in the State's view women who seek such abortions have waited too long.

A-10.

The State concedes even more in this Court. It first misconstrues the Joint Opinion in *Casey* as holding the view that "a woman who fails to exercise her right to choose abortion before viability has consented to the state's intervention on behalf of the developing child." Pet. 17 (citing *Casey*, 505 U.S. at 870 ("*In some broad sense it might be said* that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.") (emphasis added)). The State then seeks to apply this misconstruction to women seeking abortions *before* viability:

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[7]Indeed, in reversing the severability decision of the court of appeals, this Court accurately characterized the "substantive intent" of the Utah Legislature as "bent on banning most abortions." *Leavitt v. Jane L.*, 116 S. Ct. at 2072.

> A woman knows she is pregnant long before she reaches her 21st week of pregnancy, the point after which she will no longer be able to obtain an abortion on demand under subsection 76-7-302(3). If she does not choose terminate her pregnancy before then, this Court's reasoning comes fairly into play.

Pet. 17. Thus, Utah's post-20-week ban has nothing (of course) to do with "informing" the woman's choice, *see Casey*, 505 U.S. at 877; the ban is designed, pure and simple, as a punishment for those women who do not exercise their right to choose abortion early enough in pregnancy to satisfy the State. The ban is a transparent effort to regulate previability abortions as though they were post-viability abortions, and thereby defy the clear guidance this Court established in *Casey*: that before viability, the State may not prohibit *any* woman from obtaining an abortion. 505 U.S. at 879.

2. Effect

The court of appeals also correctly held that the effect of the ban is to impose a substantial obstacle in the path of women seeking previability abortions. *See* A-11 (for "those women seeking nontherapeutic abortions of nonviable fetuses after twenty weeks from conception" "section 302(3) imposes more than a substantial obstacle; it constitutes an outright ban"). Under *Casey*, the ban is an undue burden and therefore invalid because "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.*, 505 U.S. at 895.

Under the district court's interpretation of subsection (3), the statute only restricts abortions at 23 weeks lmp and

later. In *Casey*, the Court wrote that "at 23 to 24 weeks [viability] *sometimes* [occurs] . . . " 505 U.S. at 860 (emphasis added). In fact, at 23 or 24 weeks lmp, viability *usually* does not occur. *See* Whyte, et al., *Extreme Immaturity: Outcome of 568 Pregnancies of 23-26 Weeks' Gestation*, 82 OBSTETRICS & GYNECOLOGY 1 (1993).[8] Moreover, the State's own expert witness, Dr. DeVore (whom the State now chooses to ignore), testified that viability is at 24 weeks lmp. Aplt. App. 140.[9] Thus, *most* women obtaining abortions at 23 or 24 weeks lmp are obtaining *previability* abortions. This subset of women certainly constitutes a "large fraction of the cases" to which the ban applies.

Moreover, as found by this Court, there is a wide margin of error in judging viability. Because estimates of gestational age by ultrasound are often inaccurate by as much as four weeks in either direction, *see Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989) (opinion of Rehnquist, C.J., joined by White & Kennedy,

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[8]This recent study showed that among a total of 55 23-week fetuses, 41 died (over 74%); and among 114 24-week fetuses, 60 died (over 52%). *See id.* at 4 (Table 2).

[9]The record is replete with expert testimony that viability typically occurs after 24 weeks, at the earliest. Dr. Warenski, who has over twenty years of experience as an obstetrician-gynecologist in Utah, testified that the earliest he had ever seen a fetus delivered and survive was "Probably 24 weeks." Aplt. App. 130; *see also* Aplt. App. 96 (severely growth-retarded 24-week fetus may not be viable); Aplt. App. 107 ("I'm not sure that we've had any 23-weekers survive."). Significantly, the Supreme Court in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), adopted a district court finding that "'23½ to 24 weeks *gestation* is the earliest point in pregnancy where a reasonable possibility of viability exists.'" *Id.* at 515-16 (opinion of Rehnquist, C.J., joined by White & Kennedy, JJ.) (emphasis added) (quoting 662 F. Supp. 407, 420 (W.D. Mo. 1987)).

JJ.), many women seeking abortions in Utah after about 16 weeks would be unable to obtain them under the ban. Utah State Statistics for 1990 reveal that as many as 167 women aborted their pregnancies after 15 weeks gestational age. Aplt. App. 207. Many of these pre-viability abortions would be unduly burdened by the ban.[10]

It does not matter that some of the late abortions performed in Utah from 1974 until 1990, *see* Pet. 13, may have been performed for "therapeutic" reasons.[11] Under *Casey*, if a woman is carrying a nonviable fetus, she has a right to terminate the pregnancy without justifying the abortion to the State. However, under the ban, the woman must satisfy her physician that the abortion is necessary for one of the three reasons allowed under the law.

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[10]Medical terminology and usage generally define an abortion as only pre-viability. *See, e.g.*, F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS at 665 (19th ed. 1993) ("Abortion is the termination of pregnancy by any means before the fetus is sufficiently developed to survive."). Those terminations done after viability are denoted "early induced deliveries," the phrase used by both plaintiffs' and the State's experts. Therefore, although Utah law does have a category of "post-viability" abortion, in practice these are often labelled induced deliveries and reported as such.

[11]Nor has the State established that the coding for "therapeutic" abortions in state statistics has the same definition as the ban's exceptions. In fact, the undisputed testimony from the director of the clinic which provides second trimester abortions was that she did not code rape and incest often, and that every year she refers 10-15 women needing abortions after 22 weeks lmp out of state. *See* Aplees. Supp. App. 158-60.

B. The Ban, Even If Intended As A Definition of Viability, Creates An Irrebuttable Presumption Of Viability At 20 Weeks In All Cases, And Is Therefore Invalid Under This Court's Precedents.

The State seeks to rescue the ban by casting it as an effort by the Utah Legislature to define viability at 20 weeks from conception (22 weeks lmp). Even assuming, *arguendo*, that the legislative history of the 1991 amendments supported this construction of subsection (3) -- and it does not[12] -- government demarcation of viability is not permitted under the directly controlling precedent of this Court.

First, in *Casey*, this Court reaffirmed that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions." *Id.*, 505 U.S. at 860. Thus, "*[w]henever it may occur*, the attainment of viability . . . serve[s] as the critical fact." *Id.* (emphasis added). In recognizing that viability does not occur at the same point in every pregnancy, *Casey* follows a line of earlier Supreme Court precedents.

In *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), this Court rejected the position that "a specified number of weeks must be fixed by statute as the point of viability." *Id.* at 65. Indeed, this Court found that:

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[12]In any event, the district court construed the post-20-week ban as defining viability. *See* B-13. But the holdings of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), and *Colautti v. Franklin*, 439 U.S. 379 (1979), quoted below apply to both legislative and *judicial* definitions of viability; neither is permitted.

> it is not the proper function of the legislature or the courts to place viability . . . at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.

Id. at 64.

Three years later, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court reaffirmed this principle:

> Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support. Because this point may differ with each pregnancy, *neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability -- be it weeks of gestation or fetal weight or any other single factor -- as the determinant of when the State has a compelling interest in the life or health of the fetus.*

Id. at 388-89 (emphasis added). *See also Hodgson v. Lawson*, 542 F.2d 1350, 1354 (8th Cir. 1976) (striking Minnesota statute stating that fetus during second half of gestation period is "potentially viable"); *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977), *vacated on other grounds & remanded*, 440 U.S. 445 (1979). Under these decisions, the State's plea that the petition must be granted to answer the question whether a State may "make a legislative judgment on viability" must be rejected: the question has already been answered, and the answer is no. *See also* A-

10 at n.6 (opining that *Casey* leaves *Roe, Danforth, Colautti*, and *Webster* as the precedents that "govern the issue" of how viability may be defined).

The Utah statute does exactly what is prohibited under *Casey* and the prior holdings of this Court. It bans abortions after 20 weeks even if, in the physician's medical judgment, the fetus is not viable. The ban wrests from the physician all discretion to make the viability determination and will ban a significant percentage of late but nonetheless pre-viable abortions. Under *Casey* and earlier decisions, this is unconstitutional. *Casey*, 505 U.S. at 878.

Nothing in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), compels a different conclusion. In *Webster*, the Court upheld a Missouri law that required physicians to perform tests necessary to make a determination of viability at 20 weeks. Justice O'Connor, who provided the key vote to uphold the statute, found that this provision did not "conflict with any of the Court's past decisions concerning state regulation of abortion." *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, *Webster* in no way casts doubt on either *Danforth* or *Colautti*.

C. The Ban Does Not Contain An Adequate Exception For Post-Viability Abortions Necessary To Protect The Woman's Health, So The Ban Is Invalid Under *Roe* And *Casey*.

Under *Roe v. Wade*, 410 U.S. 113 (1973), the State may proscribe abortion "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65. This precise language from *Roe* was specifically quoted and reaffirmed in *Casey*, 505 U.S. at 846; *see also id.* at 880 ("the

essential holding of *Roe* forbids a State from interfering with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"). Under *Roe* and *Casey*, the ban -- even viewed as a post-viability ban -- is constitutionally inadequate. *See* A-13 n.7.

The ban allows health-saving abortions only when necessary "to prevent *grave* damage to the pregnant woman's medical health." Utah Code Ann. § 76-7-302(2)(d) (emphasis added). Because it permits only those post-viability abortions necessary to prevent *grave* damage to the woman's health, the ban violates *Roe*'s mandate that a such restrictions have an exception for abortions necessary to protect the woman's "health." Neither *Casey* nor *Roe* differentiates between different degrees of damage to health, but leaves these difficult judgments to physicians who must render this necessary medical care.

In an unbroken line of cases from *Roe* to *Casey*, this Court has established that the physician must be given the discretion to determine that the health of the woman necessitates an abortion after viability. In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court condemned any "'trade-off' between the woman's health and additional percentage points of fetal survival." *Id.* at 400. It follows that if the State may not trade off the woman's health for fetal survival, it may not require the woman to bear an increased health risk, as Utah's statute does, before she may obtain a post-viability abortion at all. In *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), this Court re-affirmed this holding of *Colautti*, emphasizing "that maternal health [must] be the physician's paramount consideration." *Id.* at 768-69. Just as in *Thornburgh* the phrase "significantly greater medical risk" heightened the health risk imposed on the woman and

rendered the Pennsylvania choice-of-method statute invalid, here the adjective "grave" heightens the health risk a woman must endure before she may obtain an abortion. Moreover, because "grave" is an inherently vague term, physicians fearful of severe criminal penalties will be chilled in the provision of post-viability abortions to protect women's health, because their judgment that a condition is "grave" may easily be second-guessed by prosecutors.

The court of appeals reasoning in finding Utah's choice of method restriction invalid is directly applicable to the language of the ban:

> According to *Casey, Thornburgh,* and *Roe*, concern for the "preservation" of a woman's health suffices to elevate her liberty interests decisively above those of the state or the unborn child. By requiring a woman to suffer "grave damage" to her health before her liberty interests predominate, the Utah legislature violated those portions of *Roe* and *Thornburgh* that *Casey* reaffirmed, and unconstitutionally devalued a woman's privacy rights.

Jane L., 61 F.3d at 1504, *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 116 S. Ct. 2068 (1996).

The State seeks to equate "preservation of health" -- the language of *Roe* -- with "grave damage to the woman's health," the language of § 76-7-302(2)(d). This equation is only possible if "grave" is read out of the statute or assigned no meaning. It is elementary "that a statute should be interpreted so as not to render one part inoperative" or unnecessary. *Colautti*, 439 U.S. at 392; *see also Thornburgh*, 476 U.S. at 769 (accepting court of appeals holding that adverb "significantly" in Pennsylvania statute

could not be reduced to surplusage, and that language of the statute "is not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus") (quoting court of appeals); *Faux v. Mickelsen*, 725 P.2d 1372, 1374 (Utah 1986). Equating "grave damage to the pregnant woman's medical health" with "health," as the State seeks to do, violates this canon of construction. Moreover, there is ample evidence in the record that "grave damage to health" -- whatever it may mean -- exceeds "damage to health."[13]

Thus, even if, contrary to governing precedent of this Court, Utah were permitted to enact a bright-line definition of viability, the ban it enacted is invalid because it flouts the command of *Roe* and *Casey* that, even after viability, a ban on abortions must contain an exception for the woman's health.

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[13]Dr. Dwight Cruikshank, one of the State's own expert witnesses, defined "grave" as "[l]oss of structure or function, shortening of life, irremediable pain and suffering." Aplt. App. 95. Another of the State's witnesses, Dr. Richard Hebertson, equated "grave" with "[s]erious, complex, threatening," Aplt. App. 93, and Dr. Watson Bowes, another witness for the State, testified that grave meant "serious, severe." Aplt. App. 136. Similarly, several plaintiffs also testified at depositions that the adjective "grave" was restrictive. Dr. Kenneth Ward was inclined to define grave as "important and serious" based on a dictionary he consulted. Aplt. App. 178. Dr. Neil Kochenour testified at deposition that, although there would be disagreement about what qualified as "grave," "physicians would take a very conservative approach to what is grave because they don't want to . . . break the law." Aplt. App. 101. These opinions are consistent with the legislative history of the ban, which glibly substituted the term "grave" for the phrase "serious and permanent."

II. THE COURT OF APPEALS PROPERLY HELD THAT WOMEN SEEKING ABORTIONS IN UTAH ARE AFFECTED BY THE BAN.

In order to circumvent the plain irreconcilability between Utah's law and *Casey*, the State argues that no women would be affected by Utah's post-20-week ban. The Court of Appeals, however, set aside as erroneous the district court's finding of fact that no woman "wants or has attempted to obtain" a late abortion prohibited by the Utah post-20-week ban, and that holding is fully supported by the record. Moreover, the State's argument on this point does not in any event weigh in favor of granting the petition, for this Court will generally not review questions of fact. *See, e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

There is ample evidence in the record that numerous women are unduly burdened by these restrictions. For example, chart no. 65886, Aplt. App. 227, describes a woman 21 weeks pregnant according to ultrasound who became pregnant as a result of rape, and chart no. 67133, Aplt. App. 232, describes another woman 21 weeks pregnant by ultrasound. *See also* Aplt. App. 235, 236 (woman 20-21 weeks pregnant as a result of rape); Aplt. App. 239, 241 (woman 20½ weeks pregnant; in jail; concerned about effects of her drug use on fetus); Aplt. App. 243, 245 (mentally handicapped woman 19 weeks pregnant who does not believe she can raise child alone). In addition, as the court of appeals pointed out:

> The record contains evidence through the declaration of the Utah Women's Health Clinic, a facility that performs approximately seventy-five percent of the abortions in Utah, that the Clinic routinely refers to another state those Utah

> residents needing an abortion after twenty weeks. She stated that in 1990, for example, the Clinic referred out of state ten to fifteen women who needed such abortions. Supp. App. of Aplees., at 158-60. While this and other evidence in the record indicate that the number of women in Utah desiring abortions after twenty weeks may be small, the *undisputed* evidence also demonstrates that some members of this group are women seeking nontherapeutic abortions of nonviable fetuses.

A-12 (emphasis added).

This Court should decline the State's invitation to re-assess these facts. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Contrary to this basic principle, the State asks this Court to engage in a detailed review of the extensive factual record in order to save a doomed statute. The question of fact presented by the State simply "does not merit Court review," *Hendricks*, 454 U.S. at 176 n.8.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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